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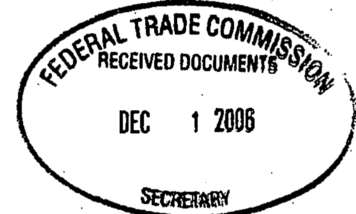
Michael D. Hausfeld
(202) 408-4600
mhausfeld@cmht.com



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Legal Policy Section
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Suite 3234
Washington, DC 20530

Donald S. Clark
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room H-135 (Annex Z)
Washington, DC 20580

Re: Comments Regarding, Section 2 Hearings, Project No. PO62106

Ladies and Gentlemen:

Cohen, Milstein, Hausfeld & Toll, P.L.L.C. ("CMHT") submits these comments in order to supplement the entire array of topics presented during the Section 2 Hearings by providing an overview of private enforcement litigation for unlawful monopolization or abuse of dominant position. We hope that this civil-side analysis will aid and augment the discussions of the consequences of these types of Section 2 violations.

Below, we address the following issues:

- Elements of a monopolization claim under Section 2, including a discussion of defining the relevant market, establishing monopoly power, and proving abuse of that power.

- Fact patterns that arise in monopolization cases, including actions involving technology and intellectual property.

- Standing to bring a monopolization claim, and how that differs for competitors and customers of a monopolist.

- Injury from monopolization, as it relates to conduct within and without the statute of limitations.

- Measuring the impact of unlawful monopolization.

Introduction

The past decade or so has seen a surge in monopolization cases, including many private actions brought by competitors and customers of monopolists. The various types of these cases are discussed in more detail below. A sampling of evidence from some recent cases, however, serves to illustrate the intent and strategies of modern-day monopolists:

- 3M entered the private-label tape business, which posed a threat to its invisible and transparent tape monopoly, only to "kill it," as shown by an internal memorandum from an executive who stated that "I don't want private label 3M products to be successful in the office supply business, its distribution or our consumers/end users." *LePage's*, 324 F.3d 141, 164 (3rd Cir. 2003).

- U.S. Tobacco Company, which maintained its monopoly in the moist snuff market through category management and other exclusionary conduct, stated in an internal document that "[i]t is imperative that we continue with this Category management action plan to eliminate competitive products," and in another document that its Consumer Alliance Program "has become a great incentive in securing space for our vendors and for the elimination of competition products." *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768, 777, 778 (6th Cir. 2002).

- Microsoft, which maintained its operating system monopoly through a variety of anticompetitive practices, stated in an internal document from one executive that "[w]e will bind the shell to the Internet Explorer, so that running any other browser is a jolting experience." *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 50 (D.D.C. 1999). A Microsoft e-mail stated that "[i]f we own the key franchises' built on top of the operating system, we dramatically widen the 'moat' that protects the operating system business. . . . We hope to make a lot of money off these franchises, but even more important is that they should protect our Windows royalty per PC. . . . And success in those businesses will help increase the opportunity for future pricing discretion." *Novell, Inc. v. Microsoft Corp.*, MDL 1332, Civil No. JFM-05-1087, 2005 U.S. Dist. LEXIS 11520 (D. Md. June 10, 2005).

- Indeed, Microsoft acknowledged that it had a "gold mine" and knew that this "gold mine" would be affected by competition. *See* Memorandum from Bill Gates to Steve Ballmer, et al., May 18, 1989, M 00006712 ("The DOS gold mine is shrinking and our costs are soaring – primarily due to low prices, IBM share and DR-DOS."); Email

> from nathanm to steveb, June 30, 1990, X 521082 ("At the very least you have to assign a probability to SPARC closing our monopoly, and thus our gold mine."). As Warren Buffett put it in an email message, "[i]t's as if you were getting paid for every gallon of water starting in a small stream but with added amounts received as tributaries turned the stream into an Amazon. . . . Bell should have anticipated Bill and let someone else put in the phone infrastructure while he collected by the minute and distance (and even importance of the call if he could have figured a wait [sic] to monitor it) in perpetuity." Email from Warren Buffett to Jeff Raikes, Aug. 21, 1997, MS-PCA 1301178.[1]

Monopolists are thus using a wide variety of anticompetitive strategies to exclude competition and maintain their position.

Elements of a Monopolization Claim Under Section 2

Section 2 of the Sherman Act makes it an offense to monopolize, attempt to monopolize, or combine or conspire to monopolize any part of the nation's interstate or foreign commerce.[2] Unlike Section 1 of the Sherman Act, Section 2 extends to unilateral conduct involving a single actor in addition to concerted misconduct by two or more persons.

Section 2 does not identify the specific elements for proving the offense of actual monopolization, but the Supreme Court has articulated the elements of the offense. Specifically, a defendant company that (1) possesses monopoly power in the relevant market and (2) willfully acquired or maintained that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident, violates § 2 of the Sherman Act. *See United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).[3]

A. Monopoly Power in the Relevant Market

Demonstrating that a defendant company possesses monopoly power first requires defining the relevant market.[4] Proof of the relevant market focuses attention upon the area of trade within which the defendant purportedly exercises monopoly control over prices and competition.[5] The relevant market analysis has two prongs. First, one must determine the "relevant product market", *i.e.*, the products or services with which the defendant's product or service effectively competes. Second, it is necessary to identify the "relevant geographical market," *i.e.*, the geographical area within which the defendant competes in marketing its product or service.[6]

1. Relevant Product Market

In determining the relevant product market, two factors are given particular attention. First, it is necessary to determine the extent to which the defendant's product is "interchangeable in use" with alleged alternative products. To determine this, the use or function of the

defendant's product is compared with that of other products. If purchasers can substitute the products for one another as to use, the products will likely be included as a single product market. *See, e.g.*, *Eastman Kodak Co. v. Image Technical Servs., Inc.* 504 U.S. 451, 482 (1992) ("Because service and parts for Kodak are not interchangeable with other manufacturers' service and parts, the relevant market from the Kodak equipments owner's perspective is composed of only those companies that service Kodak machines."); *Menasha Corp. v. News Am. Mktg. In-Store, Inc.* 354 F.3d 661, 665 (7th Cir. 2004) (a market consisting of "at-shelf coupon dispensors" was not a viable relevant market, despite fact that shoppers preferred the convenience of the dispersers, given unrefuted evidence of the ready substitutability of more traditional means of delivering product coupons to consumers). *But see U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986 (11th Cir. 1993) (because of strong "brand loyalty" for a higher priced version of a product, the premium brand version should have been excluded from the relevant market, even though in theory it was a functional substitute for lower-priced versions in the market).

Second, in determining the relevant product market, one must determine the cross-elasticity of demand between products. To do this, one examines the extent to which a change in the price of one product will alter demand for another product. If a slight change in the price of one will significantly affect demand for the other, then both products will generally be included in the same product market. *See, e.g.*, *E.I. DuPont,* 351 U.S. 377; *Olin Corp. v. Fed. Trade Comm'n,* 986 F.2d 1295 (9th Cir. 1993) (relevant market consisted of only certain types of dry pool sanitizing chemicals and excluded other types, where evidence indicated that because of differences in ease of use and duration, customers would not switch to latter type of chemical unless the price of the former went up at least 10 percent).

Though interchangeability of use and the cross elasticity of demand are the main factors in determining the relevant product market, the Supreme Court has announced other considerations for use in narrowing product markets or submarkets for antitrust purposes, including "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe Co. v. United States,* 370 U.S. 294, 325 (1962); *see also Grinnell Corp.*, 384 U.S. at 572 (expressly approving application of these factors to monopolization cases).[7]

2. <u>Relevant Geographical Market</u>

In determining the relevant geographical market, one must focus on the geographical area within which the defendant's customers affected by the challenged practice can practically turn to other sellers for supplies, if the defendant were to seek to raise its price or restrict output. *See United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 359 (1963) ("The area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.");

Lantec, Inc. v. Novell, Inc. 306 F.3d 1003, 1027 ("The geographic market is not comprised of the region in which the seller attempts to sell its product, but rather is comprised of the area where his customers would look to buy such a product."). Factors to take into consideration include the area within the parties sell their products, the size and perishability of the products, regulatory requirements restricting the flow of goods into the area, shipping costs of transporting the products, and the area where the defendant companies view themselves competing. *See, e.g., United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974).[8]

3. Monopoly Power

Once the product and geographical markets have been identified, one must establish that the defendant possesses "monopoly power." Monopoly power is oftentimes defined as the "power to control prices or exclude competition" within the relevant market. *See E.I. DuPont,* 351 U.S. at 391; *see also Eastman Kodak Co.,* 504 U.S. at 464 and 481 ("Market power is the power 'to force a purchaser to do something that he would not do in a competitive market.' It has been defined as 'the ability of a single seller to raise price and restrict output.' The existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market.") (citations omitted). There are several ways to show that a defendant has monopoly power, including but not limited to: (1) demonstrating that a defendant accounts for a high percentage of total industry sales within the market;[9] (2) demonstrating that the defendant has actually exercised price leadership control over the industry;[10] and (3) demonstrating that the defendant has take actions that have excluded actual or potential competitors.[11]

B. Willfully Acquired or Maintained Monopoly Power

Once a plaintiff demonstrates that a defendant has monopoly power in the relevant market, the plaintiff must prove that the defendant "willfully" acquired or maintained that monopoly power, "as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident."[12] The mere possession of monopoly power does not violate Section 2.

Courts have consistently found defendants' conduct to be "willful" where that conduct is itself illegal under different sections of the antitrust laws. *See, e.g., Eastman Kodak Co.,* 504 U.S. 451 (tying restraints); *Grinnell Corp.,* 384 U.S. 563 (acquisitions of competitors, market allocations, discriminatory pricing). The issue is much more complicated, however, when the monopolizing conduct is not independently illegal. The three major Supreme Court decisions which address this issue are *Aspen Skiing*, *Eastman Kodak,* and *Verizon Communications, Inc. v. Law Offices of Curtis v. Trinko, LLP.* In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585 (1985), the Supreme Court affirmed a decision finding that a defendant, owner of three of the four major downhill skiing facilities in Aspen, monopolized the market by denying the owner of the fourth slope access to a "multi-mountain" pass which allowed skiers to ski on multiple slopes on the same ticket. In coming to this conclusion, the Supreme Court found "it is

not necessary for [the plaintiff] to prove that each allegedly anticompetitive act was itself sufficient to demonstrate an abuse of monopoly,"[13] but rather use of a "record as a whole" approach. Also, the Court held that in determining if the defendant's conduct was "exclusionary," one need not only look at the conduct's effect on the plaintiff, but also "to consider [the conduct's] impact on consumers and whether it has impaired competition in an unnecessarily restrictive way."[14] The Court also considered evidence of strong customer preference for the multi-slope pass, the plaintiff's loss of market share, the inability of the plaintiff to provide an alternative multi-slope pass, and the defendant's failure to offer any efficiency justification for its conduct.[15] Notably, the Supreme Court also found that "evidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive'... there is agreement on the proposition that 'no monopolist monopolizes unconscious of what he is doing.'"[16]

In *Eastman Kodak Co.,* 504 U.S. 451, independent service organizations that serviced Kodak's equipment brought an antitrust suit against Kodak.[17] The plaintiffs alleged that Kodak's policies limited the availability of Kodak parts to the service organizations and thus violated Section 1 and 2 of the Sherman Act. After finding that Kodak did have monopoly power, the Court considered the issue of whether Kodak adopted its parts and service policies to willfully acquire or maintain monopoly power. The Court found that there was evidence that Kodak took "exclusionary" action to maintain its monopoly. The Court found that unless Kodak could justify its actions on the basis of valid business reasons, Kodak would be liable under Section 2: "Liability turns, then, on whether 'valid business reasons' can explain Kodak's actions."[18] The Court however, did not clarify who has the burden of proof on these issues and the circuit courts currently differ in their approach. *See e.g., LePage's Inc. v. 3M,* 324 F.3d 141, 164 (3d Cir. 2003) (defendant's burden to persuade jury that its conduct was justified by normal business purpose.) *United States v. Microsoft Corp.,* 253 F.3d 34, 53-54 (D.C. Cir. 2001) (plaintiff establishes a prima facie case under § 2; the burden then shifts to the defendant to assert a pro-competitive justification; and the burden finally shifts back to the plaintiff to rebut that claim).

Finally, in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP* 540 U.S. 398 (2004), the Supreme Court held that a regional telephone company did not engage in illegal monopolizing conduct by violating its obligations under the Federal Telecommunications Act of 1996 to share its network system and equipment with defendants. The plaintiffs included consumers who were allegedly injured because their telephone company was unable to receive network service support from the defendant as mandated by the Telecommunications Act.[19] In rejecting the consumers' "refusal-to-deal" claim, the Supreme Court distinguished it from *Aspen Skiing.*[20] The Court in *Trinko* found that the refusal to deal at issue in *Aspen Skiing* created an inference of anticompetitive conduct because *Aspen Skiing* purposefully ceased participation in a presumably profitably voluntary course of dealing with the plaintiff.[21] The unilateral termination of this course of dealing, even where the defendant was offered compensation at the

same retail prices it charged skiers, "suggest[ed] a calculation that [the defendant's] future monopoly retail price would be higher."[22]

In *Trinko*, Defendant's conduct was distinguished based on the fact that prior to the 1996 Act, the Defendant did not provide its competitors with access to its network facilities, and the provision of access required by the 1996 Act was costly, involuntary, and not profitable. *Id.* Defendant's conduct provided no evidence of profit-sacrifice whereas, by contrast, *Aspen Skiing* featured evidence of profit-sacrificing since the defendant had refused to offer services that it voluntarily offered to its retail customers.[23]

This distinction between *Aspen Skiing* and *Trinko* emphasizes the importance of prior conduct in evaluating the allegedly illegal exclusionary conduct. It seems as though where there is evidence that prior dealings led to short-term profits (inferred from the fact that the *Aspen Skiing* defendants' conduct was voluntary), a refusal to deal with competitiors that sacrificed short-term profit "suggest[s] a calculation that [the] future monopoly retail price would be higher." [24]

Common Fact Patterns That Arise in Section 2 Cases

Modern-day monopolization cases often involve companies attempting to extend their monopoly power through: (1) the abuse of the administrative or judicial process; (2) contract terms that restrict competitor access to channels of distribution; (3) the use of market share or bundled rebates coupled with exclusive dealing; and/or (4) the commission of business torts. Although the cases may be grouped into four basic fact patterns, they often involve more than one type of behavior, as well as conduct that is otherwise lawful. It has therefore become increasingly common for Section 2 plaintiffs to argue, with varying degrees of success, that defendants' conduct as a whole is anticompetitive and exclusionary.

Among the fact patterns discussed below are several that involve issues of technology (such as the *Microsoft* case) and intellectual property (such as the drug cases). In considering these cases, it is particularly important to take into account the presence of network effects. As the European Commission has explained:

> Network effects arise when consumers place greater value on larger networks than small ones. Examples include telephone networks where, in the absence of an obligation to interconnect, users directly derive value from being able to communicate with many other users, but also networks of users of computers where users indirectly derive value from more software being made available to large networks.[25]

In addition, "network effects may allow the dominant company to 'tip' the market as the tying can deprive its rivals of the chance to derive network effects through the tied customers. The stronger the network effects, the higher the likelihood of foreclosure."[26]

A. Abuse of Administrative or Judicial Process

With respect to regulatory abuse, a series of cases arose out of utilities' practice of charging higher prices to wholesale customers than to retail customers. *See City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373 (9th Cir. 1992); *City of Groton v. Conn. Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981); *City of Mishawaka v. Am. Elec. Power Co.*, 616 F.2d 976 (7th Cir. 1980). In those cases, the defendant utilities generated, transmitted, and sold electricity at wholesale to municipal plaintiffs, and also at retail to their own customers. The municipalities in turn distributed the power to their retail customers. Defendants were able to charge differing rates because the wholesale rates charged by utilities became effective automatically, whereas retail rates were dependent on specific approval by a state authority. According to plaintiffs, this meant that defendants could "price squeeze," or charge their wholesale customers a higher rate in order to impede competition with the utilities in the retail market. Because the price squeezes were the lawful result of the regulatory process, courts were reluctant to find Section 2 liability on that basis alone. *See City of Anaheim*, 955 F.2d at 1378 (noting its hesitancy to find liability based on a price squeeze and that "other courts have insisted on something more than the squeeze itself"). Instead, the decisions have turned on whether defendants' overall conduct exhibited anticompetitive intent and effect, and the credibility of defendants' business justification. *See City of Anaheim*, 955 F.2d at 1379 (holding that price squeeze and defendants' restriction of access to its power line did not constitute Section 2 violation because defendant "simply sought rate orders that it considered to be just and reasonable" under the circumstances); *City of Mishawaka*, 616 F.2d at 981 (finding Section 2 violation because "all of the utility's acts and practices as a whole, its wholesale rate structure together with its statements threatening the power supply of the municipalities, its expressed preference in favor of its own retail customers and its policy of acquiring municipal distribution systems in distress, evidenced a specific intent to capitalize on and increase its monopoly power at the expense of the municipalities"); *City of Groton*, 662 F.2d at 935 (overall "synergistic effect" of defendants' practices did not give rise to section 2 liability because there was "no general intent to impede the municipalities' competitive position or to enhance [the utility's] alleged monopoly power").

Another context in which abuse of process has occurred is in the field of intellectual property. The gist of these cases is that defendants fraudulently obtained a patent or copyright on a product and then tried to enforce exclusivity through regulatory and judicial means. Although a grant of patent ordinarily exempts the patent holder from the normal prohibition against monopolies when the patent has been procured by fraud this immunity is stripped away. *See Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965). An entity enforcing a patent known to have been fraudulently obtained to exclude competition can thus be liable under the antitrust laws.

Thus, cases have been brought against manufacturers of pharmaceutical products that have used ill-deserved patents to foreclose companies manufacturing generic forms of the drug from being able to market the generic versions. Since generic drugs are invariably cheaper, this conduct harms those purchasing the drug. [27] In pharmaceutical antitrust litigation, the plaintiffs usually allege that defendant drug manufacturers obtained their patents fraudulently and that defendants exploited the Hatch-Waxman regulatory regime to extend the exclusivity period on their invalid or unenforceable patents. Under Hatch-Waxman, FDA approval of a generic drug is automatically stayed for 180 days once the brand-name manufacturer files a patent infringement action. Drug manufacturers thus have an incentive to commence an action, even when they have no good faith basis for doing so. Although defendants' individual acts may be deemed lawful or protected by the First Amendment under the Noerr-Pennington doctrine, plaintiffs have sometimes had success proceeding on an overall scheme theory. *E.g.*, *In re Remeron Antitrust Litig.*, 335 F. Supp. 2d 522, 528 (D.N.J. 2004) (refusing to dismiss "overall scheme" claim based on plaintiffs' allegations that defendant obtained its patent through fraud on the PTO, improperly listed the patent in the Orange Book, engaged in sham patent litigation, and improperly delayed listing another patent in the Orange Book in order to extend its monopoly). *Cf. Biovail Corp. Int'l v. Hoechst Aktiengesellschaft*, 49 F. Supp. 2d 750, 772 (D.N.J. 1999) (holding that plaintiff adequately pled violations of Section 2 based on, *inter alia*, defendant's interference with both the FDA and Canadian approval process for plaintiffs' generic drug, defendant's public threat to bring a patent infringement action against plaintiff, and defendant's alleged attempt to pay plaintiff to delay its entry into the market); *Michael Anthony Jewelers, Inc. v. Peacock Jewelry, Inc.*, 795 F. Supp. 639, 646 (S.D.N.Y. 1992) (counter-plaintiff stated a cause of action for monopolization and attempted monopolization based on "a concerted pattern of exclusionary conduct, including the copying of competitors' [diamond cut gold] charms, the fraudulent procurement of copyright protection, and the maintenance of sham litigation to protect its monopoly over those designs"). [28]

B. Contracts that Restrict Competitor Access to Distribution Channels

Monopolization cases also have been based on contract provisions that prevent a competitor from gaining access to important channels of distribution. *E.g.*, *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 184 (3d Cir. 2005) (holding that artificial teeth manufacturer's policy of prohibiting authorized dealers from adding competitors' tooth lines to their product offerings violated section 2 of the Sherman Act); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1309 (9th Cir. 1982) (defendant liable for attempt to monopolize based on evidence that defendant used "excessively long contract terms in its purchases of concession rights," which excluded competitors; included follow-the-franchise causes in its contracts, which ensnared additional sports teams and facilities; and repeatedly used lavish loans and cash payments to procure long-term contracts and contract extensions). *But see J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc.*, No. 1:01-CV-704, 2005 WL 1396940 (S.D. Ohio June 13, 2005) (distinguishing contract at issue from *Dentsply* on the basis that Dentsply's contract clause

barred *all* competition from the dealer network, which was how the majority of dental products were sold on the market).

United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001), merits discussion because it illustrates how a monopolist's contractual restrictions on distribution access points may constitute a Section 2 violation. In *Microsoft*, the government challenged, among other things, (1) defendant's licenses to original equipment manufacturers ("OEMs"); (2) defendant's agreements with internet access providers ("IAPs"); and (3) defendant's agreements with independent software vendors. OEMs and IAPs are the two most effective means of distributing computer software. In its licensing agreements, Microsoft prohibited OEMs from removing any desktop icons, folders, or start menus entries, altering the initial boot sequence, or otherwise altering the appearance of the Windows desktop. Because of these restrictions, OEMs were deterred from pre-installing a second browser onto their computers and from promoting IAPs, which, at the time, were using Netscape Navigator. Microsoft made agreements with IAPs to ensure that IAP subscribers were offered Internet Explorer as either the default browser or only browser. Finally, Microsoft agreed to give internet software developers preferential technical support if they used Internet Explorer as their default browser and used an HTML help function that could only be accessed through Internet Explorer. The court ultimately held that these agreements violated the antitrust laws because they improperly extended Microsoft's monopoly in operating systems market.

Before analyzing the claims, the court explained the applications entry barrier in the operating systems market and the critical relationship between internet browsers and operating systems. It is difficult to enter the operating systems market for two reasons: (1) most consumers prefer operating systems for which a large number of software applications have already been written, and (2) software developers prefer to write programs for operating systems that already have a large consumer base. Microsoft Windows contains application program interfaces ("APIs") that make software programming easier. Every operating system has a different API so that if a software developer writes an application for one system, such as Windows, and wishes to sell to users of different system, it must modify the program for that other operating system. Internet browsers, such as Netscape Navigator, expose their own APIs, which can be used *across* operating systems. Thus, internet browser usage is important because

> [i]f a consumer could have access to the applications he desired—regardless of the operating system he use[d]—simply by installing a particular browser on his computer, then he would no longer feel compelled to select Windows in order to have access to those applications; he could select an operating system other than Windows based solely upon its quality and price. . . . Therefore, Microsoft's efforts to gain market share in one market (browsers) served to meet the threat to Microsoft's monopoly in another market (operating systems) by keeping rival browsers from gaining

> the critical mass of users necessary to attract developer attention away from Windows as the platform for software development.

Id. at 60. When viewed against this backdrop, the court found that Microsoft's licenses and agreements had the effect of unlawfully maintaining its monopoly in the operating systems market by preventing OEMs, IAPs, and internet software developers from distributing browsers other than Internet Explorer. *See id.* at 58. The *Microsoft* case therefore teaches us to scrutinize the agreements made by manufacturers at the level of distribution.[29]

C. Discounting Practices: Market Share Discounts, Bundled Rebates, and Exclusive Dealing Contracts

A third category of cases concerns discounting practices used to exclude competition. An important recent case on this issue is *LePage's, Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003), in which the plaintiff challenged 3M's multi-tiered bundled rebate structure and exclusive dealing contracts. Under 3M's discounting plan, customers of transparent tape received higher rebates when they purchased products from six of 3M's diverse product lines. In addition, the rebate programs set specific target growth rates in each product line, and the size of the rebates were linked to the number of product lines in which targets were met. If the customer failed to meet a target for any one product, it lost the rebate across the line. This structure created a huge incentive for customers to increase purchases from 3M's many product lines in order to maximize their discounts. Furthermore, 3M entered *de facto* exclusive dealing arrangements with office superstores and mass merchandisers, which were essential for achieving economies of scale. The jury ultimately decided that 3M's actions supported claims for monopolization and attempted monopolization. The Third Circuit upheld the verdict on appeal, reasoning that 3M's conduct as a whole had an anticompetitive effect in the transparent tape market, and that the savings realized by customers from single invoices and single shipments did not justify the defendant's behavior.[30]

Recent cases have applied this theory of liability to the healthcare industry and particularly to the sale by entrenched manufacturers of various medical devices through exclusionary means that foreclose competition. Such practices have caused healthcare entities to overpay for crucial medical devices, contributing to the escalating costs of healthcare nationwide. These cases typically allege that the defendant's pricing plan is exclusionary because the price a customer is required to pay is tied to the customer making purchases across several product lines, as well as the customer meeting a large percentage of their needs from one manufacturer. If the customer fails to fulfill its market share requirement in just one product line, it pays higher prices and loses not only its current rebates on the other product lines, but must also forfeit past rebates received from the manufacturer. Group purchasing organizations ("GPOs") offer an extra opportunity for entrenchment because they bargain for discount pricing on behalf of health care facilities, which must usually accept the negotiated prices pursuant to their membership agreements. The medical device suppliers therefore try to secure sole-source

agreements with the GPOs. The combination of market share discounts, bundled rebates, and sole-source agreements may be exclusionary if other suppliers cannot compete on quality or price. *See McKenzie-Williamette Hosp. v. Peacehealth*, No. Civ. 02-6032-HA, 2004 WL 3168282, at *3 (D. Or. 2004) (defendant liable for attempt to monopolize based on evidence that defendant negotiated with third party to secure defendant's hospital as the sole preferred provider of acute care hospital services, and defendant exploited its monopoly in tertiary services by bundling strategic discounts for these services). [31]

D. Business Torts

In the final group of cases, the plaintiffs allege antitrust violations based on the defendants' independently tortious acts. In *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768, 788 (6th Cir. 2002), the court held that there was "sufficient evidence for a jury to find willful maintenance of monopoly power." In the moist snuff industry, point-of-sale displays are crucial marketing devices due to restrictions on tobacco advertising. Here, there was evidence that the United States Tobacco Co. ("USTC") removed Conwood's display racks from stores without the permission of store management and discarded or destroyed the racks; trained USTC representatives to take advantage of inattentive store clerks with ruses such as obtaining nominal permission to reorganize or neaten the moist snuff section; and misused its position as category manager to provide misinformation to retailers about the superiority of USTC products. In affirming the jury's verdict, the court rejected defendant's approach of viewing its conduct as isolated tortious acts, but instead found that the acts evinced a pattern of exclusionary conduct that would support an antitrust claim.[32] Similarly, other courts have been willing to base section 2 liability on a defendant's interference with a competitor's business relationships. *See Alexander v. Nat'l Farmers Org.*, 687 F.2d 1173 (8th Cir. 1982) (finding conspiracy to monopolize based on milk cooperatives' practice of short shipping, threatening to short ship, and delivering milk late as a warning to buyers of the risk of disruption if they continued to purchase from independent milk suppliers); *Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295 (D. Utah 1999) (denying summary judgment, in part, because Microsoft made false and misleading announcements about its upcoming projects to deter OEMs from entering licensing agreement with others, and created the false impression that users would encounter compatibility problems if they used DR DOS instead of MS DOS with Windows).

Standing to Bring a Monopolization Claim

As the Supreme Court has explained, "the focus of the doctrine of 'antitrust standing' is somewhat different from that of standing as a constitutional doctrine." *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 n.31 (1983). In general, a plaintiff must be "a consumer [or] a competitor in the market in which trade was restrained." *Id.* at 539; *see also Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979) (holding that consumers have antitrust standing). Even then, not every competitor has standing, *see Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (holding that competitors had no standing in the

absence of harm to competition); nor does every customer have standing, *see Illinois Brick Co. v. Illinois*, 431 U.S. 720, 737-38 (1977) (holding that indirect purchasers lack standing).

In certain types of monopolization cases, competitors may have standing when customers do not. For example, a purchaser may lack standing to bring an attempted monopolization claim, because "supracompetitive pricing does not result from an attempt to monopolize when the monopolization is not achieved." *In re Air Passenger Computer Reservation Sys.*, 727 F. Supp. 564, 569 (C.D. Cal. 1989) (noting that "the predatory conduct which supports a claim for either monopolization or attempted monopolization harms competitors, but consumers are harmed by the supracompetitive rates charged by a monopolist."). *But see Strong v. BellSouth Telecomms., Inc.*, Civ. A. No. 93-0999, 1994 U.S. Dist. LEXIS 21450, at *12 (W.D. La. Jan. 21, 1994) ("We decline at this time to hold that the plaintiffs lack standing to continue forward with their attempted monopolization claim. Recent case law indicates that consumers may have standing."). Similarly, a purchaser may lack standing to bring a *Walker Process* claim[33] for fraudulent procurement of a patent, but can bring antitrust claims on other grounds. *See In re Remeron Antitrust Litig.*, 335 F. Supp. 2d 522, 529 & n.6 (D.N.J. 2004) ("Plaintiffs, as direct purchasers, neither produced mirtazapine nor would have done so; moreover, Plaintiffs were not party to the initial patent infringement suits. Plaintiffs may not now claim standing to bring a *Walker Process* claim by donning the cloak of a Clayton Act monopolization claim.").

A related issue arises in cases alleging that a monopolist excluded competition through the use of rebates or other financial inducements, *see supra* § III.C, because defendants in such cases may argue that the purchasers benefited from the allegedly anticompetitive conduct. Yet the court in *Meijer, Inc. v. 3M*, Civ. A. No. 04-5871, 2005 U.S. Dist. LEXIS 13995 (E.D. Pa. July 13, 2005),[34] rejected such an argument:

> Here, 3M argues that the Complaint fails to state a valid claim for antitrust injury because, although the Complaint alleges rebate programs and exclusive dealing arrangements with retailers, "it does not necessarily follow . . . that Meijer or the class it seeks to represent suffered any injury at all because such retailers benefitted directly and significantly from those rebates." The Complaint alleges as follows:
>
> > As found in LePage's or otherwise, 3M's unlawful maintenance of its tape monopoly has suppressed competition and has maintained tape prices paid by direct purchasers to 3M above competitive levels, even after any 3M rebates attributable to tape purchases. . . . 3M has used its unlawful monopoly power described herein to harm [Meijer] and other Class members in their business or property by

> increasing, maintaining, or stabilizing the prices they paid for invisible and transparent tape above competitive levels.
>
> Moreover, the Complaint alleges that 3M "intended to use, did use, and continues to use" its "anitcompetitive and monopolistic practices in the conduct of trade or commerce." The Court has previously held that these allegations, "if proven, could establish that, were it not for [3M's] anti-competitive conduct, [Meijer] would have paid less for transparent tape than it actually paid during the damages period, even when any bundled rebates or other discounts are taken into account." The Court, therefore, concludes that Meijer has properly alleged injury of the type the antitrust laws were designed to prevent. Accordingly, 3M's Motion is denied in this respect.

Id. at *20-*21 (quoting *Bradburn Parent/Teacher Store, Inc. v. 3M*, Civ. A. No. 02-7676, 2003 U.S. Dist. LEXIS 13273, at *4 (E.D. Pa. July 24, 2003); other citations and footnote omitted).

Injury from Monopolization and the Statute of Limitations

Absent tolling, the statute of limitations for antitrust actions is four years. *See* 15 U.S.C. § 15(b). The statute begins to run when the defendant commits an act that injures the plaintiff. Critically, when the plaintiff is a customer (as opposed to a competitor) of the defendant, the anticompetitive conduct does not injure the plaintiff unless and until it pays a resulting overcharge. For this reason, the law is clear that the statute begins to run as to an overcharge claim only upon payment of the overcharge. All overcharges paid within the limitations period, therefore, may be recovered.

So long as damages are sought only for purchases made during the limitations period, it does not matter that the defendant's anticompetitive conduct may have occurred in the pre limitations period. Thus, several courts have held that purchasers can recover damages for the four years preceding the filing of a complaint (or longer, if tolling applies), even if the anticompetitive conduct occurred earlier. *See Molecular Diagnostics Labs. v. Hoffman-La Roche Inc.*, Civil A. No. 04-01649, 2005 U.S. Dist. LEXIS 30142, at *26-*27 (D.D.C. Dec. 1, 2005); *Meijer, Inc. v. 3M*, Civ. A. No. 04-5871, 2005 U.S. Dist. LEXIS 13995, at *17 (E.D. Pa. July 13, 2005); *In re K-Dur Antitrust Litig.*, 338 F. Supp. 2d 517, 551 (D.N.J. 2004); *In re Buspirone Patent Litig.*, 185 F. Supp. 2d 363, 378 (S.D.N.Y. 2002).

"Generally, a cause of action accrues and the statute [of limitations] begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971); *see also* 15 U.S.C. § 15(a). A customer is not injured by a monopolist unless and until the customer makes a purchase at a supracompetitive price. *See*

Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 295 (2d Cir. 1979) ("[T]he purchaser's claim cannot accrue until it actually pays the overcharge. . . . [I]f the monopolist never consummates its scheme by taking this final step, the purchaser has no cause of action."). Thus, "[w]hen a § 2 action is filed in a timely fashion, the customer will be able to collect damages for the four years prior to filing and will be able to rely on pre-limitation conduct in order to establish the exclusionary practices portion of a monopolization claim." 2 Philip A. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 320c4 (2d ed. 2000).

When the plaintiff is a purchaser that was injured by paying supracompetitive prices as a result of unlawful monopolization, damages from future overcharges are always speculative:

> Plainly, at the time a monopolist commits anticompetitive conduct it is entirely speculative how much damage that action will cause its purchasers in the future. Indeed, some of the buyers who will later feel the brunt of the violation may not even be in existence at the time. Not until the monopolist actually sets an inflated price and its customers determine the amount of their purchases can a reasonable estimate be made. The purchaser's cause of action, therefore, accrues only on the date damages are "suffered."

Berkey Photo, 603 F.2d at 295-96 (citations omitted). As the Second Circuit has explained, cases brought by purchasers are different from cases brought by competitors:

> Although the business of a monopolist's rival may be injured at the time the anticompetitive conduct occurs, a purchaser, by contrast, is not harmed until the monopolist actually exercises its illicit power to extract an excessive price. . . . So long as a monopolist continues to use the power it has gained illicitly to overcharge its customers, it has no claim on the repose that a statute of limitations is intended to provide.

Id. at 295.

The point is illustrated by *Buspirone*, in which both competitors and customers sued for damages resulting from the defendants' antitrust violations. *See* 185 F. Supp. 2d at 365-66. One damages claim, asserted by both types of plaintiffs, was based on an anticompetitive settlement entered into by the defendants in December 1994, over four years before the *Buspirone* case began. *See id.* at 366, 379-80. The court ruled that while "the claims by the generic competitors arising out of the Schein Settlement activities are barred by the four year statute of limitations," the claims of "the purchaser plaintiffs . . . survive this motion to dismiss to the extent that the claims are based on allegations of injury arising from purchases of Buspar® at allegedly inflated prices beginning four years prior to the filings of their respective Complaints." *Id.* at 380 (emphases added).[35]

Measuring the Impact of Unlawful Monopolization

The impact of unlawful monopolization can be measured through expert analysis. For example, in the Platinol case, one of the drug patent cases discussed above, an economist described a methodology for computing aggregate overcharges to the plaintiff class:

> In order to compute aggregate overcharges to the Class, I have developed a model based upon (a) my work in this and analogous cases, (b) my review of economic literature discussing the effects of generic competition (and, in some cases, efforts to delay it), and (c) features specific to the history of the distribution of Cisplatin itself. My model sets forth a "but-for" world of Cisplatin purchase volumes and prices that could reasonably have been expected for the Class but for (*i.e.*, in the absence of) the alleged anticompetitive behavior. This but-for experience is based upon a combination of (a) the actual prices and purchase quantities for Platinol® and generic Cisplatin that occurred once generics began being marketed in November 1999, drawn from actual sales data available to me both through internal company data and through commercially available data from a nationally recognized data collection service known as IMS; and (b) the experience of other pharmaceutical markets following episodes of generic entry analogous to that which would have occurred here.[36]

Similarly, in the *Microsoft* case, economic analysis was used to calculate the 55.1 percent overcharge to purchasers of Microsoft operating system software licenses.[37]

Another way to look at the extent of impact in these cases is to examine recent verdicts and settlements obtained against monopolists. For example, LePage's obtained a $22.8 million verdict against 3M in 2000, which was trebled to $68.5 million, and Conwood obtained a $350 million verdict against U.S. Tobacco in 2002, which was trebled to $1.05 billion. The following chart lists some recent settlements between monopolists and their customers:

In re Microsoft Antitrust Litig. (2003)	$10.5 million[38]
In re Buspirone Antitrust Litig. (2003)	$90 million
Oncology & Radiation Assocs., P.A. v. Bristol Myers Squibb Co. (2003)	$65.8 million
In re Relafen® Antitrust Litig. (2004)	$175 million
North Shore Hematology-Oncology Assocs., P.C. v. Bristol Myers Squibb Co. (2004)	$50 million

In re Remeron Direct Purchaser Antitrust Litig. (2005)	$75 million
Meijer, Inc. v. 3M (2006)	$27.8 million

Conclusion

Again, we greatly appreciate the opportunity to participate in this process and look forward to a continuation of our ongoing dialogue related to any or all of the issues discussed herein.

Very truly yours,

Cohen, Milstein, Hausfeld & Toll, P.L.L.C.

Michael D. Hausfeld
Brent W. Landau
Andrew B. Bullion

MDH:bs

Attachments

[1] These three documents were provided to the court and discussed at a hearing on class certification in *In re Microsoft Antitrust Litig.*, MDL No. 1332 (D. Md. Oct. 17, 2003), at which CMHT represented the proposed class. An excerpt of the relevant transcript pages and the slides used during the hearing are attached hereto as Exhibit A.

[2] 15 U.S.C. § 2.

[3] To bring a private cause of action, a plaintiff will also need to satisfy the antitrust standing requirements, *i.e.*, antitrust injury. *See generally Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 535-536 (1983).

[4] In some circumstances, monopoly power can be demonstrated by direct evidence, rather than by defining a relevant market and assessing whether a firm has a dominant

share of that market. The pertinent inquiry for demonstrating monopoly power with direct evidence is whether a defendant's conduct has permitted it to profitably raise or maintain prices above competitive levels. *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) ("Where evidence indicates that a firm has in fact profitably [raised prices substantially above the competitive level], the existence of monopoly power is clear."); *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1016 (6th Cir. 1999) (stating plaintiff can prove monopoly power by proving "actual control over prices or actual exclusion of competitors").

[5] *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

[6] *Standard Oil Co. v. United States*, 221 U.S. 1, 61 (1911); *T. Harris Young & Assoc., Inc. v Marquette Elec.*, 931 F.2d 816 (11th Cir. 1991); *Antitrust Law Handbook*, 2005 § 3.4.

[7] However, the continued status of considering "submarkets" is unclear. In the Supreme Court's decision in *Eastman Kodak Co.*, 504 U.S. 451, the Court omitted any reference to "submarkets." However, lower court decisions still recognize the concept of submarkets. *See e.g., Olin Corp. v. Federal Trade Comm'n*, 986 F.2d 1295, 1299 (9th Cir. 1993) ("[W]ithin one market there may exist additional submarkets relevant for antitrust purposes... Because every market encompasses less than all products is, in a sense, a submarket, these factors are relevant even in determining the primary market to be analyzed for antitrust purposes.") (citations omitted).

[8] *See also Fed. Trade Comm'n v. Procter & Gamble Co.*, 386 U.S. 568 (1967); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966).

[9] *Eastman Kodak Co. v. Image Technical Servs., Inc.* 504 U.S. 451, 481 (1992).

[10] *United States v. Microsoft Corp.*, 253 F.3d 34, 53 to 54 (D.C. Cir. 2001).

[11] *Re/Max Int'l*, 173 F.3d at 1009.

[12] *See United States v. Grinnell Corp.* 384 U.S. 563, 570-71 (1966).

[13] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 599 (1985).

[14] *Id.* at 605.

[15] *Id.* at 607-611.

[16] *Id.* at 602 (quoting *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 432 (2d Cir. 1945)). In contrast, if a plaintiff brings a claim of attempted monopolization, intent is required. Specifically, the offense of attempted monopolization includes four elements: 1) product and geographic dimensions of the relevant market that the defendant has sought to monopolize, 2) must be demonstrated that the defendant has engaged in anticompetitive conduct, as opposed to lawful competition, 3) plaintiff must prove that defendant specifically intended to acquire monopoly power within the market, and four, the defendant's actions must have reached a state such that there is a dangerous probability that an actual monopoly position will ultimately be achieved. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

[17] *Eastman Kodak Co.*, 504 U.S. 451.

[18] *Id.* at 483.

[19] *Trinko,* 540 U.S. at 416.

[20] *Trinko,* 540 U.S. at 409-11.

[21] *Id.* at 409.

[22] *Id.* at 399.

[23] *Id.* at 409.

[24] *Id.* at 399.

[25] European Commission, DG Competition, DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, Dec. 2005, at 42 n.91.

[26] *Id.* ¶ 199 (citing Commission decision in Case No. COMP/37.792 Microsoft of 24.3.2004); *see also* ECTA comments on DC COMP Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses, ¶ 3.1 ("ECTA welcomes the recognition at para. 199 that in cases where there are significant scale economies, learning curve, network effects or entry barriers in the tied market (a situation very familiar to the ECTA members), the foreclosure effects of tying and bundling are likely to be strongest. This is very relevant in telecommunications market where often the dominant player did not acquire scale economies etc. due to the superiority of its products, or because it engineered a technological breakthrough, but because it obtained a network on privatization and where the level of product differentiation in the tied market [para. 200] is often minimal.").

[27] CMHT has successfully litigated a number of cases against drug manufacturers on this theory, including cases involving the drugs Buspar (*In Re Buspirone Antitrust Litigation*, MDL No. 1413 (S.D.N.Y)), Platinol (*North Shore Hematology-Oncology Assoc. P.C. v. Bristol-Meyers Squibb Co.*, Case No. 04-CV-00238 (D.D.C.)), Remeron (*In Re Remeron Direct Purchaser Antitrust Litig.*, MDL No. 03-CV-0085(FSH) (D.N.J)), and Taxol (*Oncology & Radiation Assoc., P.A v. Bristol-Meyers Squbb Co.*, Case No. 01-CV-02313 (D.D.C)), and is actively litigating several others, including cases involving the drugs DDAVP (*In Re DDAVP Direct Purchaser Antitrust Litig.*, Case No. 05 Civ. 2237 (CLB) (S.D.N.Y)), TriCor (*Meijer, Inc. v. Abbot Labs.*, Civ. Action No. 05-cv-358 (D. Del.)), and Wellbutrin (*In Re Wellburtrin SR Antitrust Litig.*, 04-Civ-5525(BWK) (E.D.Pa.)).

[28] CMHT also is litigating cases involving fraudulently-obtained patents that involve products other than pharmaceutical drugs. For example, CMHT is litigating a case against Hoffman-La Roche, Inc. and its long-time business partner, Applera Corp., alleging that those parties used a fraudulently obtained patent to corner the market for a crucial enzyme used in DNA research and medical diagnostics. (*Molecular Diagnostic Laboratories v. Hoffman-La Roche , Inc.*, Case No. 04-CV-01649 (HHK) (D.D.C.)).

[29] CMHT served as co-chair of the Lead Counsel Committee in private antitrust litigation against Microsoft. (*In Re Microsoft Corp. Antitrust Litig.*, MDL No. 1332 (D. Md.)).

[30] CMHT represents direct purchasers in related litigation against 3M. (*Meijer, Inc. v. 3M*, Civ. A. No. 04-5871 (E.D.Pa.)).

[31] CMHT is litigating cases against dominant manufacturers of several medical devices, including various endomechanical products used in minimally-invasive surgery (*Niagara Falls Mem'l Med. Center v. Johnson & Johnson*, Case No. CV05-8900-PA (CWx) (C.D. Cal)) and products used in pulse oximetry (*Applied Orthopedic Appliances, Inc v. Tyco Health Care Group L.P.*, Master File No. CV-05-6419 MRP (C.D. Cal.)). Indeed, it appears that these practices are becoming more common, particularly in the medical device industry, and run the gamut from cases such as *Allied*, in which there is only one dominant supplier of the product, to cases such as *Niagara Falls*, in which there may be more than one large supplier but in which the dominant player utilizes many of the same tactics.

[32] CMHT represented direct purchasers in related litigation against USTC. (*In re Smokeless Tobacco Antitrust Litig.*, Case No. 00-cv-01454 (D.D.C)).

[33] *See Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965).

[34] CMHT represented the plaintiffs in *Meijer.*

[35] There is nothing extraordinary about an antitrust plaintiff relying on pre-limitations period conduct. Indeed, courts have allowed suits based on conduct that occurred long before the litigation was commenced. *See, e.g., Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 n.15 (1968) (challenged policy began in 1912, but litigation was commenced in 1955; the Court held that "[a]lthough Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955"); *Imperial Point Colonnades Condo., Inc. v. Mangurian*, 549 F.2d 1029, 1041 (5th Cir. 1977) (challenged agreement were reached in 1969, but litigation was commenced in 1975; the court held that "[s]uch defendants hardly are in a position to argue for the protection of the statute of limitations . . . when it is the defendants' own recent conduct that results in a finding of a newly accruing cause of action"). As the Second Circuit observed, "[i]t may, of course, be difficult for a purchaser to demonstrate that conduct occurring many years before the commencement of suit contributed to an overcharge that it paid within the limitations period. That, however, is no reason for denying it the opportunity to do so." *Berkey Photo*, 603 F.2d at 298 (emphasis added).

[36] Decl. of Jeffrey J. Leitzinger, Ph.D., *North Shore Hematology-Oncology Associates, P.C. v. Bristol-Myers Squibb Co.*, Case No. 1:04-cv-00248-EGS (D.D.C.), filed Nov. 22, 2004, ¶ 15 (attached hereto as Exhibit B).

[37] *See* Pls.' Mem. of Law in Supp. of Their Mot. For Final Approval of Proposed Settlement, *In re Microsoft Corp. Antitrust Litig.*, MDL Docket No. 1332 (D. Md.), filed Feb. 5,

2004, at 1, 9 (attached hereto as Exhibit C). The class settled for an amount equal to the overcharge calculated by the plaintiffs' expert. *See id.*

[38] This was the settlement in the federal multi-district litigation, which was for 100 percent of estimated damages. *See supra* note 37. Microsoft also settled with a number of indirect purchaser plaintiffs in various state court actions, including for benefits worth $1.1 billion dollars in California, $202 million in Florida, $174.5 million in Minnesota, and smaller amounts in other states.

EXHIBIT A

1
IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION
3

4

5 IN RE: MICROSOFT LITIGATION
_______________________________/
6

7
MDL No. 1332
8 Friday, October 17, 2003
Baltimore, Maryland
9 (Class Certification Hearing)

10

11 Before: Honorable J. Frederick Motz, Judge

12
Appearances:
13
On Behalf of Direct Resellers:
14 Michael Hausfeld, Esquire

15 On Behalf of Defendant Microsoft:
David B. Tulchin, Esquire
16 Michael F. Brockmeyer, Esquire

17

18

19

20 (Please Note: Only those who verbally participated have been listed.)
21
Reported by:
22 Mary M. Zajac, RPR
Room 3515, U.S. Courthouse
23 101 West Lombard Street
Baltimore, Maryland 21201
24

25

1 a strategic behavior to create, maintain, and exploit market
2 power.
3 That is significant, Your Honor, because we're not
4 looking at a company that just reacted to a threat of an
5 individual potential competitive entrant, but to every potential
6 competitive entrant across the board because, as a monopolist,
7 that was the position it had to maintain strategically. It had
8 to act across the board against all competitive potential
9 entrants in order to protect its operating system monopoly to
10 all direct purchasers from it of that operating system.
11 And then we just compiled a list of some of the
12 companies against whom Microsoft has taken this strategic
13 anticompetitive behavior. And this chart, Your Honor, displays
14 the variety and the breadth of those companies that were, we
15 claim, and their experts view, as illustrative of the operation
16 of that unlawful maintenance. Not only does it cover different
17 companies but it covers entire time period so that this was not
18 merely focused on one particular year or one particular moment
19 in time.
20 Again, after you eliminate those competitors and you
21 essentially cleared the market for yourself, what did Microsoft
22 perceive to be the advantage it obtained or maintained as a
23 result of that anticompetitive behavior? This is Microsoft's
24 own description, its acknowledgment internally of what it
25 realized as a direct result of foreclosing entry into the

1 operating system by potential competitors: They had a gold
2 mine. They knew they had a gold mine. And they knew that gold
3 mine would be affected by competition.
4 In fact, when they were faced with competition from
5 Sun and others, they foresaw that their gold mine would close
6 their monopoly and thus close their gold mine.
7 What's most important about this document in
8 particular, Your Honor, is the date, 1990, at a time when
9 Microsoft publicly claimed that it did not know it was a
10 monopoly. In fact, even as early or late, depending upon how
11 you want to look at it, a year or so ago, when I took Mr.
12 Ballmer's deposition, I asked him, did Microsoft have a monopoly
13 in 1990? And he said absolutely not. That's not what the
14 company understood in 1990.
15 What kind of monopoly did they have? What kind of
16 gold mine was this operating system?
17 In a very candid exchange between Microsoft and Warren
18 Buffett, Mr. Buffett explained the simplicity of what Bill Gates
19 had done with the operating system monopoly. It was like
20 Microsoft was being paid for every gallon of water starting in a
21 small stream but with added amounts received as tributaries
22 turning into the Amazon.
23 But then he wasn't satisfied with that illustration.
24 He went on and said, you know, Alexander Bell should have
25 anticipated Bill Gates and let someone else put the phone

1 infrastructure in while he collected by the minute and distance,
2 and even importance of the call, if he could have figured a way
3 to monitor it, in perpetuity.
4 What did Microsoft want? What did it understand it
5 had? It understood that it had the ability, essentially, to
6 erect the largest single monopoly known to the world. Not only
7 would companies in the United States be dependent on the
8 manufacture of its operating system, but literally globally they
9 would control the entire access to computer technology.
10 Microsoft said, it's not enough just to be the
11 dominant in the computer industry, not just the software
12 industry. When the world looks to Microsoft for all its
13 solutions and then selects any hardware from the commodity
14 hardware market, then Microsoft understood it would own the
15 world.
16 This goes, Your Honor, to the intent of the company in
17 terms of understanding its market power and exercising that
18 market power. What did they do? What did they know they could
19 do? And what was the reaction of the market to what they did?
20 There is almost a Jekyll and Hyde perception of
21 Microsoft. The good is that Microsoft is the innovator in
22 technology. The bad is that it got that way because it stole
23 other companies' technologies.
24 We have a clip that displays that side of Microsoft,
25 that supports the findings of Judge Jackson, Judge Kotelly, and

The Operating Systems "Gold Mine"

Microsoft Memorandum from Bill Gates to Steve Ballmer, et al. *May 18, 1989*

Microsoft Memo

TO: Steve Ballmer, Joachim Kempin, Paul Maritz, Russ Werner, Nathan Myhrvold

FROM: Bill Gates

CC: Jon Shirley, Jeremy Butler, Richard Fade, Jon Lazarus, John Sabol, Peter Neupert, Mike Maples, Scott Oki

DATE: May 18, 1989

SUBJECT: Operating System Strategy

My recent trip to Europe gave me time to gather data and think [illegible] operating system strategy.

The DOS gold mine is shrinking and our costs are soaring - primarily due to low prices, IBM share and DR-DOS. Making Windows a strong product benefits our gold mine and protects it in the following ways:

DR-DOS. I doubt they will be able to clone Windows. It is very difficult to do technically, we have made it a moving target and we have some visual copyright and patent protection. I believe people underestimate the impact DR-DOS has had on us in terms of pricing.

IBM's market share increase. The new IBM [illegible] machines are designed and priced assuming they can achieve 1M [illegible] addition to their other sales. This will destabilize many of our custo[illegible] us a lot of revenue. I think IBM's MCA strategy and the move to [illegible] networking will increase their share. IBM's failure to exploit the 386 [illegible] portable markets is not likely to be repeated. I am impressed with their salesmen. We can make money from them with Windows - retail yields the highest dollars, but OEM makes it a standard. OEM is the best long term.

Lower prices. Microsoft can't get more than the following royalties for DOS alone.

EndUser	[illegible]	$	$	
300	250	5	2	8086
1000	500	10	2	286
2000	1000	20	2	386 HD
3000	1500	30	2	386SX HD

CONFIDENTIAL

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Microsoft

HIGHLY CONFIDENTIAL

X003070

The DOS gold mine is shrinking and our costs are soaring – primarily due to low prices, IBM share and DR-DOS.

I believe people underestimate the impact DR-DOS has had on us in terms of pricing.

M-00006712

The Operating Systems "Gold Mine"

Microsoft Email from nathanm to steveb June 30, 1990

From nathanm Fri Jun 29 18:04:11 1990
Date: Fri Mar 13 15:11:57 PDT 1992

To: carls
Cc: riscpc
Record-folder: C:\NATHANM\FOLDERS\SENT.FLD
Subject: RE: Compaq-Perez
Date: Fri Jun 29 18:05:30 1990

Mail-Flags: 0000

At the very least you have to assign a probability to SPARC closing our monopoly, and thus our gold mine. There are very few if any other problems where this is true, or where the probability is as high.

So, what to do about it? Our answer has evolved into the following:

- Cause a new machine to enter the PC market which draws on the same basic sources of strength as SPARC (RISC, open processor etc.), but has system software which is controlled by Microsoft.

- Ensure that this machine has a better fit with the present PC industry, and a smoother transition path than SPARC. This is a unique advantage that SPARC does not have at present, and which we are in a position to provide. The two primary factors are a good way to capture PC industry ISVs and getting the support of the 1st tier PC OEMs (and their distribution channel).

- The positioning of the machine is NOT to attack Sun in their present workstation market, but rather to have the machine BE a PERSONAL COMPUTER in every way except those necessary to deny SPARC key advantages, of which the RISC processor is the primary one.

- If we accomplish this before SPARC attains the critical mass necessary to enter our market, we have won because this machine will deny them the differentiating advantages that they want to use against us. Sun can stay in the direct sales workstation market (over time RISC based PCs will diminish that market, but not destroy it overnight), but they will not be able to penetrate the PC market, and probably would not even try. The war will be won without ever directly firing a shot.

- Note that there is no intermediate position for a monopolist. If we are proactive and cause this machine to happen in advance of market demand we can easily block SPARC (in fact Sun will deny they ever wanted our market) by using our present power to install the new machine. If we wait until Sun has critical mass, then it will be very hard to fight. This is largely a battle for perceptions and mindshare, and the very fact that an alternative to the hated Microsoft has risen will signal to the industry that we are not in a monopoly position. Our key asset is that today thinking about going a different route is so crazy people don't even try. Intel has caused enough hate for itself that people are cloning its chips and thinking about RISC. Sun caused enough hate in the UNIX world that people signed up to OSF. In our case the same phenomena is happening, but it is not at the stage where anybody CURRENTLY takes the opposition as seriously as Sun vs OSF - but that could easily happen unless we nullify the competition with RISC PC.

X 521082
CONFIDENTIAL

The RISC PC project is aimed at doing this. The operating system that we put on it must fit these goals. At one point we thought that this would be OS/2, because Cruiser was supposed to be shipping in late 89 and we would attract the 32 bit apps that were developed for it. Instead Windows is the primary PC industry phenomena (see below for some differences in our perceptions of

WinMail 1.21 lynnra Fri Mar 13 15:02:39 1992 Page: 85

At the very least you have to assign a probability to SPARC closing our monopoly, and thus our gold mine.

X 521082

The Operating Systems "Gold Mine"

8/21/97 Email from Warren Buffett to Jeff Raikes

In effect the company has a royalty on a communication stream that can do nothing but grow. It's as if you were getting paid for every gallon of water starting in a small stream but with added amounts received as tributaries turned the stream into an Amazon. The toughest question is how hard to push prices and I wrote a note to Bill on that after our December meeting last year. Bell should have anticipated Bill and let someone else put in the phone infrastructure while he collected by the minute and distance (and even importance of the call if he could have figured a wait [sic] to monitor it) in perpetuity.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

NORTH SHORE HEMATOLOGY-ONCOLOGY ASSOCIATES, P.C.,	)
Plaintiff	)
v.	)
BRISTOL-MYERS SQUIBB CO.,	)
Defendant	)

DECLARATION OF JEFFREY J. LEITZINGER, PH.D.

Econ One Research, Inc.

November 22, 2004

5th Floor
601 W. 5th Street
Los Angeles, California 90071
(213) 624-9600
fax: (213) 624-6994

Suite 200
1004 Prairie
Houston, Texas 77002
(713) 228-2700
fax: (713) 228-3296

Suite 1170
1215 K Street
Sacramento, California 95814
(916) 449-2860
fax: (916) 449-2870

Suite 734
2010 Corporate Ridge Road
McLean, Virginia 22102
(703) 749-1440
fax: (703) 749-7719

I. Background

1. I am an economist and President of Econ One, an economic research and consulting firm with offices in Los Angeles, Sacramento, Houston and the Washington D.C. area. I have masters and doctoral degrees in economics from UCLA and a bachelor's degree in economics from Santa Clara University. While at UCLA, one of my areas of concentration was industrial organization, which involves the study of competitive markets including the application of antitrust policy to the market system. During the past 24 years of my professional career, industrial organization has remained the principal focus of much of my work. In that regard, I have had extensive experience in quantitative economic analysis.

2. I have worked on numerous projects relating to antitrust economics and economic damages. I have frequently assessed damages resulting from anticompetitive conduct, and I have substantial experience in the calculation of damages in class-action litigation. In addition, I have experience in designing methods for allocating damages among class members in class-action cases.

3. I have testified as an expert economist in state and federal courts and before a number of regulatory commissions. A more detailed summary of my training, past experience and prior testimony is shown in Exhibit 1.

4. I am generally familiar with the economic literature regarding prescription drugs and the impact of the entry of generic drugs into pharmaceutical markets. The methodologies described in that literature for performing quantitative analysis of the effects of generic entry are generally similar to techniques I have used throughout my career to make assessments of economic impact and damages in other industries and markets.

5. In that regard, I have studied data reflecting the effects of generic entry and served as the damages expert in six recent antitrust cases that involve allegations of overcharges to direct purchasers of a brand name drug because of blocked or delayed generic entry. These antitrust cases are: (1) *In re: Cardizem CD Antitrust Litigation*, MDL No. 1278 (E.D. Mich) (direct purchaser class claims settled for $110 million); (2) *In re: Buspirone Patent and Antitrust Litigation*, MDL No. 1413 (S.D.N.Y) (direct purchaser class claims settled for $220 million); (3) *In re: Relafen Antitrust Litigation*, No. 01-CV-12239 WGY (D. Mass.) (direct purchaser class claims settled for $175 million); (4) *In re: Terazosin Hydrochloride Antitrust Litigation*, MDL No. 1317 (S.D. Fla) (litigation ongoing); (5) *In re: Ciprofloxacin Hydrochloride Antitrust Litigation*, MDL No. 001383 (E.D. New York) (litigation ongoing) and (6) *In re: Remeron Direct Purchaser Antitrust Litigation*, No. 03-CV-0085 (D. N.J.) (litigation ongoing).

6. In the *Cardizem* case, I prepared an analysis of aggregate, class-wide damages incurred by a class of direct purchasers for purposes of mediation and settlement. The direct purchaser class case settled for $110 million. I also prepared an analysis for purposes of allocation of the settlement proceeds among class members.

7. I performed a similar role in the *Buspirone* case. On April 11, 2003, the court approved a settlement of $220 million for the direct purchaser class. I prepared a report analyzing aggregate damages to the direct purchaser class and proposed a damages allocation approach, which was submitted to the court in support of approval of the class settlement and allocation plan. It is my understanding that the court approved the settlement and my proposed allocation approach as fair and reasonable. I subsequently undertook the data analysis and calculations that formed the basis of the allocation of the net settlement funds to the members of the class.

8. In the *Relafen case*, I submitted three expert reports on class-wide damages and other issues on behalf of a class of direct purchasers of the brand name drug Relafen, alleging impact and damages due to delayed generic entry. The direct purchaser class case settled for $175 million. I also prepared an analysis for purposes of allocation of the settlement proceeds among class members.

9. I submitted four expert reports on class-wide damages and other economic issues in the *Terazosin* case on behalf of a class of direct purchasers of the brand name drug Hytrin, similarly alleging impact and damages due to delayed generic entry. In the *Ciprofloxacin* case, I have submitted two expert reports on behalf of a class of direct purchasers of the brand name drug Cipro, making similar allegations relating to antitrust impact and damage flowing from delayed competitor entry. In the *Remeron* case, I have submitted two expert reports on class-wide damages and other economic issues on behalf of a class of direct purchasers of the brand name drug Remeron, also making allegations of impact and damages due to delayed generic entry.

10. In the course of my work in these prior cases, I developed and refined a model for calculating damages for classes of direct purchasers of brand name pharmaceuticals alleging antitrust injury in the form of overcharges resulting from an alleged delay in competition from equivalent generics. Having now analyzed the circumstances of this case, I have concluded that the same basic methodology that I used in the *Cardizem, Buspirone, Relafen, Terazosin, Ciprofloxacin and Remeron* cases to calculate damages can be appropriately applied here. In the body of this declaration below, I provide a brief description of the damages methodology that I employed, and the conclusions I have reached.

11. I have also been asked to propose a procedure for the allocation of the Settlement Fund, net of attorneys' fees and expenses ("Net Settlement

Fund"), among Class members. In this regard, I have been asked to consider the differences in the amount of damages that may have been sustained by individual Class members as well as issues associated with the implementation and management of the allocation approach. In the second part of this Declaration, I recommend an allocation procedure.

II. Aggregate Damages Methodology

12. The Class in this case comprises direct purchasers of the prescription drug Cisplatin in its branded form, Platinol® and Platinol®-AQ (referred collectively herein as Platinol®), from defendant Bristol-Myers Squibb Company ("BMS") or its wholly-owned subsidiary Oncology Therapeutic Network, Inc. ("OTN"), during the period June 19, 1999 through September 8, 2004.[1] Excluded from the Class are governmental entities, and certain entities that have opted-out of the Class.

13. Plaintiffs allege that BMS engaged in an "anticompetitive scheme to prevent any generic pharmaceutical manufacturer from successfully entering the market for Cisplatin"[2] in order to, "illegally maintain its monopoly in the United States market for its cancer drug sold under the name Platinol® and Platinol®AQ."[3] Plaintiff alleges that BMS did so when it, among other things,

[1] Order Conditionally Certifying Settlement Class, Preliminarily Approving Proposed Settlement, and Authorizing Notice to Be Sent to the Class, *North Shore Hematology-Oncology Associates, P.C., v. Bristol-Myers Squibb Co.*, ¶ 3.
[2] Class Action Complaint, *North Shore Hematology-Oncology Associates, P.C., v. Bristol-Myers Squibb Co.*, ¶ 56.
[3] *Ibid*, ¶ 1.

"fraudulently obtained the '925 patent to be listed in the Orange Book"[4] and prosecuted "baseless, sham patent litigation against their prospective generic competitors."[5]

14. Plaintiff further claims that, but for BMS's alleged conduct, generic competitors such as APP, Sicor, Baxter, and Bedford would have launched their generic versions of Platinol® several months earlier than they actually did. Assuming that, as alleged in the Complaint, Defendant had engaged in anticompetitive behavior that delayed entry of generic versions of Cisplatin, Class members incurred overcharges (*i.e.*, price paid for direct purchases of Cisplatin that were greater than they otherwise would have been).

15. In order to compute aggregate overcharges to the Class, I have developed a model based upon (a) my work in this and analogous cases, (b) my review of economic literature discussing the effects of generic competition (and, in some cases, efforts to delay it), and (c) features specific to the history of the distribution of Cisplatin itself. My model sets forth a "but-for" world of Cisplatin purchase volumes and prices that could reasonably have been expected for the Class but for (*i.e.*, in the absence of) the alleged anticompetitive behavior. This but-for experience is based upon a combination of (a) the actual prices and purchase quantities for Platinol® and generic Cisplatin that occurred once generics began being marketed in November 1999, drawn from actual sales data

[4] *Ibid*, ¶ 56.
[5] *Ibid*, ¶ 80.

available to me both through internal company data[6] and through commercially available data from a nationally recognized data collection service known as IMS; and (b) the experience of other pharmaceutical markets following episodes of generic entry analogous to that which would have occurred here.

16. In summary, I first break the damages period into separate sub-periods to reflect changes in the competitive landscape that occur over time. I then calculate average per unit overcharges for direct Cisplatin purchases by the Class as the difference between the actual average prices paid by the Class during a given sub-period, and the average prices that would have been paid in the but-for world during that same sub-period. I then multiply these per-unit overcharges by the Class's purchase quantities that suffered an overcharge during the same sub-period to obtain aggregate overcharges for each sub-period. By summing these sub-period totals over the entire damages period, I compute the aggregate Class overcharge.

17. Generic competition would have reduced costs for purchasers of Cisplatin (both as branded Platinol® and in its generic form) in three well-recognized ways. First, a new generic entrant typically enters the market at prices below those being charged for the brand product--usually at a price that is (at least initially) set explicitly as a percentage discount off of the price of the

[6] I have used detailed transactional sales data, provided to me by Class counsel from BMS (inclusive of OTN), APP, Sicor, Abbott (during the period it marketed Sicor's Cisplatin), Baxter and Bedford.

brand-name drug. As a result of this price advantage--and various institutional and market factors that promote substitution towards lower-priced generics--new generic entrants typically capture substantial sales from the brand within a few months.

18. Second, additional (second-stage) generic entrants--whose ability to enter, I understand, is sometimes legally blocked until six months after the first generic applicant receives final approval from the FDA--generate additional price competition among generics, leading to further generic price reductions and to additional losses in market share for the brand product.

19. Third, in response to generic price competition and the loss of market share, both as a result of initial generic entry and second-stage entry, the brand manufacturer sometimes elects to reduce its price, often to selected customers in the form of increased discounts off of list prices.

20. Damages incurred by Class members stem from three forms of overcharge, which flow from and correlate to the three effects described above. First, the anticompetitive delay in generic entry delayed the shift of purchases away from Platinol® to less expensive, but therapeutically equivalent, generic Cisplatin alternatives. I refer to damages arising from this delay as Brand-Generic or "BG" overcharges.

21. Second, the delay in initial generic entry necessarily delayed the whole competitive process unleashed by generic entry. This competitive process

can take years to produce its full benefits for purchasers.[7] As a result, after the date at which initial generic entry actually occurred, Class members paid more for the generic products that they actually bought than they would have paid had initial generic entry commenced earlier. I call these damages Generic-Generic or "GG" overcharges.

22. Third, and finally, the anticompetitive delay in generic competition can result in overcharges associated with Platinol® purchases that would have continued even after the generic became available. Due to the delayed generic competition, these purchases lost the added discounts on the brand that often accompany generic competition. I call these damages Brand-Brand or "BB" overcharges.

III. Assumptions Employed in Analyzing Aggregate Class Damages

A. Competitive Entry

23. According to the Complaint, BMS engaged in an "anticompetitive scheme to prevent any generic pharmaceutical manufacturer from successfully entering the market for Cisplatin"[8] in order to "illegally maintain its monopoly in the United States market for its cancer drug sold under the name Platinol® and Platinol®AQ."[9] Plaintiffs allege that BMS did so when it, among other things,

[7] I discuss some of the reasons for the length of this adjustment process below.
[8] Complaint, ¶ 56.
[9] *Ibid*, ¶ 1.

"fraudulently obtained the '925 patent to be listed in the Orange Book"[10] and prosecuted "baseless, sham patent litigation against their prospective generic competitors."[11]

24. Plaintiffs further claim that, but for BMS's alleged conduct, competitors would have launched their generic versions of Platinol® closer to their respective tentative approval dates from the U.S. Food and Drug Administration ("FDA") than they actually did. For my work in this case, I had been asked to assume that generic Cisplatin would have begun to be sold starting July 1, 1998. I was also asked to assume that damages would only begin to accrue to the Class on July 1, 1999 due to what I understand to be restrictions imposed by the applicable statute of limitations. In actuality, APP launched generic Cisplatin in November 1999, followed by Sicor (marketed through Abbott until January 2003) and Baxter in June 2000, and by Bedford in January 2001.

B. Assumptions Regarding the Length of the Damages Period

25. The competitive process unleashed by generic entry can take years to produce its full benefits for purchasers. Customers' replacement of branded products with generic versions of the same product tends to increase over time. As the amount of substitution increases, the competitive pressure on prices (both

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[10] *Ibid*, ¶ 56.
[11] *Ibid*, ¶ 80.

for the branded version and its generic counterparts) also increases, and vice versa.

26. According to studies of other prescription pharmaceuticals that have faced generic competition,[12] prices and quantities of both the brand and the generic versions of the drug continue to adjust to the presence of generic competition for some years after initial generic entry. Based upon my examination of changes in prices and volumes following actual generic Cisplatin entry, the Cisplatin market achieved a new competitive equilibrium four years following initial generic entry.[13]

27. Therefore, Class members were affected by the alleged delay in generic entry both during the period of the delay itself and for four years thereafter while the competitive adjustment process caught up to where it would have been had there been no delay. Until that "catch-up" point was reached, the average cost per unit of the drug molecule to direct purchasers at any time in the actual world was higher than it would have been at that same point in time in the but-for world. Hence, the period I have used to assess damages in this case terminates at the end of October 2003, four years following the date at which generic entry finally occurred (November 1999).

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[12] See Grabowski, H. and J. M. Vernon, *Longer Patents for Increased Generic Competition in the US*, PharmacoEconomics, v. 10, suppl. 2, 1996, and Rozek, R. P., and R. Berkowitz, *The Costs to the U.S. Health Care System of Extending Marketing Exclusivity to Taxol*, Journal of Research in Pharmaceutical Economics, v. 9, no. 4, 1999, pp.21-40.

[13] An competitive adjustment process of this length is consistent with my experience involving the same process in a number of other pharmaceutical markets.

C. Prices and Volumes Following But-For Generic Entry

28. I used models fitted to the actual experience in the Cisplatin market following generic entry in November 1999 to estimate prices and market shares that would have occurred had the same pattern of generic entry begun earlier, i.e., in July 1998. In effect, I simply wound the clock back sixteen months. In that way, my analysis of the but-for world during this period directly reflects the real world experience of the same manufacturers, the same products and the same customers that would have made up the market but-for the alleged anticompetitive conduct. Again I note here that due to the statute of limitations, I have been asked to assume that damages do not begin accruing to the Class until July 1999.

29. In projecting prices and volumes through the end of the damage period, I relied on trends in the Cisplatin data and on my experience with other brand drugs facing generic competition. On that basis, I have projected that the market share of generics will grow to 95% of the Cisplatin molecule market[14] by the end of the damage period. I have also concluded that generic prices will continue declining as a result of competition among generic sellers, eventually leveling off at 55% of brand prices.[15]

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[14] For purposes of this Declaration, the Cisplatin market includes branded Platinol and all of its generic equivalents.

[15] These figures are consistent with specifications I have made in analogous cases and are based upon my reading of pertinent economic literature, discussions with Dr. Stephen Schondelmeyer (a noted expert in pharmaceutical economics), and my examination of the volume and pricing data in this and other cases.

30. When generic products became available, some (wholesaler) Class members found that some of their former Platinol customers chose instead to purchase the generic product directly from the manufacturer--in effect, bypassing them in the chain of distribution. This leads to an overall reduction in the share of Cisplatin purchases attributable to Class members ("Class market share"). Following the first availability of generic Cisplatin in November 1999, total monthly Class Cisplatin purchases declined on average by 23%, presumably as the result of this generic bypass. In recognition of the fact that earlier entry of generic Cisplatin would have likely induced a similar change in total Class purchase volume, I have explicitly accounted for this generic bypass phenomenon in my but-for volume specifications.

IV. The Mechanics of The Overcharge Calculation

31. I have divided the period after but-for generic entry into the following five sixteen-month sub-periods:

a) From July 1998 through October 1999,[16] inclusive;
b) From November 1999 through February 2001, inclusive.
c) From March 2001 through June 2002, inclusive.
d) From July 2002 through October 2003, inclusive.
e) From November 2003 through February 2005,[17] inclusive.

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[16] Although I have limited damages to begin accruing as of July 1999, data in the period July 1998 through June 1999 is used to estimate the initial price and substitution effects resulting from but-for generic entry in July 1998.

32. Conceptually, the calculation of the BG overcharge is quite simple. The BG overcharge in each sub-period is the difference between the average net price[18] actually paid for the branded product and the average net price at which competing generic alternatives would have been available but-for the anticompetitive conduct, multiplied by the quantity of brand purchases that Class members would have replaced with competing generic purchases in the but-for world (but did not because their availability was delayed).

33. Net prices actually paid each sub-period for Platinol® were readily calculated from the data provided by BMS in this case. But-for prices for the competing generic alternatives are derived in the manner and based upon the assumptions described above.[19] To get total BG overcharges to the Class, I simply sum all of the total sub-period overcharges over the entire damages period.

34. In the but-for world, I calculate the quantity of additional branded purchases that would have been shifted to the lower-priced, competing generic alternatives as the lesser of:

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[17] This last sub-period is used as a reference period reflecting equilibrium prices and volumes after generic entry. I forecast these quantities in this sub-period based upon existing manufacturer data.

[18] Net prices include deductions to the gross price for any chargebacks and discounts received by the Class.

[19] See ¶ 28. I use the price and substitution behavior following actual generic entry as a reasonable basis for estimating behavior after but-for generic entry.

a) The drop in but-for Platinol® purchases relative to actual Platinol® purchases during each sub-period (summed across Class members); or

b) The increase in but-for generic purchases relative to actual generic purchases during each sub-period (summed across Class members).[20]

35. This insures that the Class members' BG overcharge volume is limited to just the amount of their actual Platinol® purchases that Class members would have replaced with generics had entry occurred at the but-for date.

36. In that way, this BG overcharge calculation explicitly accounts for generic bypass. Under this formulation, in order for Class members' decreases in branded purchases within any sub-period to contribute to the aggregate BG overcharge, those reduced branded purchases must accompany a corresponding increase in generic purchases within the same sub-period.

37. Calculation of the GG overcharge volumes begins by determining how much generic Cisplatin Class members purchased directly from generic manufacturers during each sub-period. The sub-period GG overcharge is computed by multiplying this volume by the difference between the net weighted-average prices for generics in the actual and but-for worlds. Total GG

[20] But-for volumes of brand and generic Cisplatin during this period are based on models fit to actual purchase volumes, in which generic entry effects have been shifted back in time.

overcharges are the sum of each sub-period value over the entire damages period.

38. Calculation of the BB overcharge volumes begins by estimating how much Platinol® Class members would have continued to purchase directly from BMS each sub-period. This is measured as the minimum of the Class' total actual and but-for Platinol® purchase volumes in each sub-period. Each sub-period BB overcharge is computed by multiplying this volume by the difference between the net weighted-average prices for Platinol® in the actual and but-for worlds. Total BB overcharges are the sum of each sub-period value over the damages period.

39. Nine[21] out of a total of 1,524 potential Class members have requested exclusion from the Class. Collectively, they amount to 0.1% of total Class Platinol® purchases. I refer to these entities as "opt-outs." Transactions by these opt-out entities were excluded in defining Class unit volumes and net prices.

40. My aggregate damages analysis produces $87.5 million in total overcharges to the Class. 19% are BB overcharges. 40% of these overcharges are BG overcharges. 41% are GG overcharges.

[21] Fourteen entities submitted forms requesting exclusion from the Class. However, five of these entities did not even qualify for the Class.

V. Allocation Plan

39. The intent of the Allocation Plan is to award distribution amounts to each Claimant in proportion to the overcharges that Claimant incurred. To accomplish that goal, I would first divide the available Net Settlement Fund[22] into three settlement pools (using the percentages reported above—19%BB, 40%BG and 41% GG—for that purpose) and then allocate to each Claimant an amount reflecting its share of the overcharges in that pool.

40. For instance, 19% of the available Net Settlement Fund would belong to the BB pool. That pool represents overcharges associated with inflated prices for the Platinol® volumes that Claimants actually purchased (and would have purchased in the but-for world). In allocating the amounts within that pool, I would use the direct Platinol® purchase volumes by each individual Claimant[23] as a percentage of the total Class-wide Platinol® purchases used to calculate BB overcharges within each sub-period to derive a BB-overcharge share for that claimant.[24]

41. Similarly, for the BG pool--representing 40% of the Net Settlement Funds--I would use each Claimant's BG overcharge percentage (calculated in an

[22] The Net Settlement Fund refers to the $50 million dollar settlement in this case, plus interest, less Court approved attorneys' fees, any named plaintiff incentive award, and approved expenses.
[23] In order to perform these calculations, I propose using the available manufacturer transaction data detailing purchases of Platinol® and AB-rated generic Cisplatin equivalents for each individual Claimant during the periods in question.
[24] In computing the overcharge share for all of the sub-periods combined, I would weight the claimant's volume percentage in each sub-period according to the size of the per-unit BB overcharge in that sub-period and then sum the weighted figures across all sub-periods. This is described in greater detail in the attached Appendix.

analogous fashion to the BB overcharge percentage described in fn. 23 and in the Appendix) to determine its share of the total pool amount. And, I would use each Claimant's GG overcharge actual percentage to allocate the GG damages pool--representing 41% of the Net Settlement funds. Algebraically, letting "NSF" stand for the total dollar value of the Net Settlement Fund, overcharge damages, D_i, awarded to Claimant i would be calculated as:

$$D_i = P_i^{BB} \times (0.19) \times NSF + P_i^{BG} \times (0.40) \times NSF + P_i^{GG} \times (0.41) \times NSF$$

or

$$D_i = P_i^{BB} \times NSF_{BB} + P_i^{BG} \times NSF_{BG} + P_i^{GG} \times NSF_{GG}$$

P_i^{BB}, P_i^{BG}, and P_i^{GG} represent the percentage shares--as described above--that determine the allocation in each pool.

42. This method has the benefit of being an accurate measure of each Claimant's purchase volumes and does not require additional data disclosure on the parts of the Claimants. I understand however, that the Plaintiff does propose that Claimants be given the option of providing their own data. If they do, they would need to provide their net purchases (and assignments thereof), expressed in the number of packages (*i.e.*, vials), of Platinol® and AB-rated generic Cisplatin equivalents. Claimants also would need to provide the National Drug Code (NDC)[25] of the product and the name of the entity from which it was purchased

[25] The National Drug Code is a number that uniquely identifies each product sold. It comprises three segments: (1) the labeler code, assigned by the FDA and specifying the "firm that manufactures, repacks or distributes a drug product;" (2) the product code, assigned by the firm, and specifying the active ingredient(s) as well as the specific strength, dosage form, and formulation;" and (3) the package code, assigned by the firm and specifying the package size (*e.g.*, the number of capsules or tablets) and package type (*e.g.*, bottle or drum of capsules, or box of unit-dose-packaged capsules). See <http://www.fda.gov/cder/ndc/index.htm>.

(*i.e.*, manufacturer, wholesaler, repackager or reseller). Should Claimants opt to provide such data, it should be in electronic files either in Microsoft Excel® (xls), or comma-separated (csv) formats, with complete documentation regarding fields in each file.

VI. Conclusion

43. As discussed above, my estimate of total aggregate damages to the Class is $87.5 million. Furthermore, I believe that the allocation method I set forth above provides a reasonable, fair, and efficient means for distributing the Net Settlement Fund to the Claimants.

44. The foregoing is true and correct to the best of my knowledge and ability.

Dated: November 22, 2004

Jeffrey J. Leitzinger, Ph.D.

Appendix: Allocation Plan Formulae

1. This appendix describes specifically how I would use the individual Claimant purchase volume data to compute Claimant shares in the BG, and GG settlement pools. In order to calculate each Claimant's shares in each of the BB, BG and GG settlement pools, I would first calculate total units (milligrams)[26] purchased by each Claimant over the following five sub-periods.

Sub-period	Net Claimant Purchases (mg)	
	Brand	Generic
(D) 7/98[27] – 10/99	B_i^D	
(S1) 11/99 – 02/01	B_i^{S1}	G_i^{S1}
(S2) 3/01 – 06/02	B_i^{S2}	G_i^{S2}
(S3) 7/02 – 10/03	B_i^{S3}	G_i^{S3}
(S4) 11/03 – 2/05	B_i^{S4}	G_i^{S4}

2. The sub-period denoted "D" captures the difference between the actual and but-for entry dates of generic Cisplatin. With the introduction of generics, more intense competition would have arisen, resulting not just in a price difference between brand and generic, but in lower brand prices as well. During sub-period D, there are both Brand-Brand (BB) overcharge damages and Substitution (BG) damages. The purchase volume information for each Claimant in this sub-period (B_i^D) contributes to both P_i^{BB} and P_i^{BG} measures.

[26] Cisplatin is manufactured in multidose vials of three different strengths of 10mg, 50mg, and 100mg. In order to analyze the overcharge allocation of all Cisplatin transactions within a single framework, I have standardized on the milligram unit. Units are net of returns.
[27] Only purchase volumes after June 1999 are eligible for damages. Prior purchases in this period are only used for weighting purposes.

3. The second through fifth sub-periods (denoted "S1", "S2", "S3" and "S4", respectively) capture differences in the actual and but-for worlds when generics were available in both. As I described above, due to the nature of competition, prices continue to fall for quite some time after generic entry. Even when generics became available, their prices were inflated relative to what they would have been (at the same point in time) had generics entered the market earlier. Because of these ongoing price declines, there are damages arising from generic purchases GG, as well as from the BB, and BG sources. The purchase volume information in these sub-periods for each claimant, namely B_i^S, G_i^S, where S = S1, S2, S3, or S4, contributes to each of the source-of-damage pool shares P_i^{BB}, P_i^{BG}, and P_i^{GG}.

4. As can be seen from the table above, all five sub-periods (D, S1, S2, S3, and S4) are of the same 16-month duration. This allows me to calculate as-is comparisons for each particular damage sub-period using the subsequent sub-period as a but-for reference. In this analysis I apportion damages to sub-periods D, S1, S2, and S3. Sub-period S4 serves only as a but-for reference for sub-period S3. In the sub-periods S1, S2 and S3 where damages are calculated, purchase volumes (B_i^S, G_i^S) enter into all of the share quantity BB, BG and GG allocations, namely P_i^{BB}, P_i^{BG}, and P_i^{GG}.

5. The following table summarizes the sub-periods in which the different damage pools come into play. For each of these pools, Claimants' observed purchase volumes are apportioned among the three damage types. Once done, I then use a separate formula for each pool to calculate each Claimant's damage proportion. Each of these formulas is explained in turn below.

Sub-period	Overcharge Type		
D	BB	BG	
S1	BB	BG	GG
S2	BB	BG	GG
S3	BB	BG	GG

6. For each Claimant i, his share of the BG damages, P_i^{BG}, would be his share of the Class-wide sum:

$$\sum_i z_i \max(\min(B_i^D - B_i^{S1}, G_i^{S1}), 0)$$
$$+ a_1 \sum_i \max(\min(B_i^{S1} - B_i^{S2}, G_i^{S2} - G_i^{S1}), 0)$$
$$+ a_2 \sum_i \max(\min(B_i^{S2} - B_i^{S3}, G_i^{S3} - G_i^{S2}), 0)$$
$$+ a_3 \sum_i \max(\min(B_i^{S3} - B_i^{S4}, G_i^{S4} - G_i^{S3}), 0)$$

Here and below, $\sum_i$ indicates a sum over all claimants. The first term in this expression takes into account relative sizes of brand purchases (less generic bypass) during the sub-period D. During this sub-period, total Class brand purchases formed the basis of the aggregate substitution damage in the aggregate model. This term measures but-for substitution units in sub-period D by comparing but-for generic purchases (G_i^{S1}) with the drop in brand purchases $(B_i^D - B_i^{S1})$. The z_i term accounts for the proportion of total purchase volumes in sub-period D that are eligible for damages (i.e., those beginning in July 1999). Similar to the first term, the second term measures substitution units in sub-period S1, comparing the rise in generic purchases ($G_i^{S2} - G_i^{S1}$) to the drop in brand purchases $(B_i^{S1} - B_i^{S2})$. Finally, the third and fourth terms perform the same comparisons for the damage sub-periods S2 and S3. Note that the combination

of the minimization and maximization functions uses all available information to correct for generic bypass.

7. The terms $a_1, a_2,$ and a_3 are scaling factors used to account for differences in the average, per-unit overcharge associated with BG damages during the different sub-periods within the overall damage period. These scaling factors are constant across Claimants and across months in each sub-period. In reality, the amount of overcharge varies both month-to-month and across Claimants, depending upon monthly changes in prices for Platinol and the available generics. One could devise a complicated model that would track monthly volumes and prices for each Claimant, in effect further adjusting the volumetric weights to account for the size of the monthly overcharge in which the Claimant's purchase activity occurred. However, this more complicated model would greatly increase the data required of Claimants for the calculation, the difficulty in communicating the nature of the allocation to Claimants, and the time to collect and analyze this additional data. At the same time, based upon my experience in working with this data, the added complication would not materially change the results. It should also be highlighted that the proposed method, which is based on manufacturer transaction level data is an accurate measurement of Claimant direct purchasing behavior (direct purchasing being the only type of purchasing that can be awarded damages) and requires no additional data disclosure on the part of the Claimants.

8. Accordingly, I have computed the scaling factors using weighted-average Class prices for brand and generic computed for the distinct sub-periods described above. For example, percentages arising from BG damages during the S1 sub-period rely upon the weighted average Class prices of Platinol and generic Cisplatin over that sub-period.

9. p_i^{BB} will be calculated as Claimant i's share of the Class-wide sum:

$$\sum_i z_i \min(B_i^D, B_i^{S1}) + b_1 \sum_i \min(B_i^{S1}, B_i^{S2}) + b_2 \sum_i \min(B_i^{S2}, B_i^{S3}) + b_3 \sum_i \min(B_i^{S3}, B_i^{S4})$$

This calculation is similar to the first in that each term calculates BB damages in a particular damage sub-period. The first term measures BB overcharge volume in sub-period D (again using the proportion z_i, as in the calculation of BG damages), while the second term measures BB overcharge volume in sub-period S1, etc. Like the aggregate calculation, for each of these sub-periods I use the minimum of the actual and but-for brand volumes as BB overcharge units. The scaling factors b_1, b_2 and b_3 account for differences in the average BB per unit overcharges between the four damage sub-periods.

10. Finally, P_i^{GG} will be calculated as Claimant i's share of the Class-wide sum:

$$\sum_i G_i^{S1} + c_1 \sum_i G_i^{S2} + c_2 \sum_i G_i^{S3}.$$

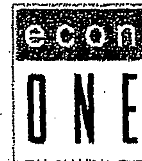
This equation again follows the logic of the first two, where each term calculates the total volume for each damage sub-period. The terms c_1 and c_2 account for differences in the average GG per unit overcharges between the four damage sub-periods.

11. Finally, putting together each Claimant i's calculated values for P_i^{BB}, P_i^{BG}, P_i^{GG} with the appropriate damage pool I use the following formula to calculate total damages, D_i, to each Claimant:

$$D_i = P_i^{BB} \times NSF_{BB} + P_i^{BG} \times NSF_{BG} + P_i^{GG} \times NSF_{GG}$$

12. The weighting factors described above are as follows:

$a_1 = 1.62$	$a_2 = 0.81$	$a_3 = 0.42$
$b_1 = 2.51$	$b_2 = 1.10$	$b_3 = 0.25$
$c_1 = 0.24$	$c_2 = 0.07$	



Dr. JEFFREY J. LEITZINGER
President
Los Angeles, California
Tel: 213 624 9600

EDUCATION

Ph.D., Economics, University of California, Los Angeles
M.A., Economics, University of California, Los Angeles
B.S., Economics, Santa Clara University

WORK EXPERIENCE

Econ One Research, Inc., President, July 1997 to date
Founded *Econ One Research, Inc.*, 1997

Micronomics, Inc., President and CEO, 1994-1997
Micronomics, Inc., Executive Vice President, 1988-1994
Cofounded *Micronomics, Inc.*, 1988

National Economic Research Associates, Inc. 1980-1988
(Last position was Senior Vice President and member of the Board of Directors)

ADMITTED AS AN EXPERT ECONOMIST TO TESTIFY ABOUT:

Relevant Markets and Competition

Before:
Federal Energy Regulatory Commission
Superior Court, State of Alaska
Superior Court, State of California
Superior Court, State of Washington
U.S. District Court, Central District of California
U.S. District Court, Northern District of California
U.S. District Court, District of Colorado
U.S. District Court, Eastern District of Missouri
U.S. District Court, Eastern District of Texas
U.S. District Court, Western District of Texas
U.S. District Court, District of Wyoming

Valuation, Economic Loss and Damages

Before:
Circuit Court, Mobile County, Alabama
Civil Court, Harris County, Texas
Civil Court, Midland County, Texas
State of Alaska Department of Revenue
Superior Court, State of California

U.S. Bankruptcy Court, District of Alaska
U.S. Bankruptcy Court, Northern District of Texas
U.S. District Court, State of Alabama
U.S. District Court, Central District of California
U.S. District Court, District of Colorado
U.S. District Court, State of Louisiana
U.S. District Court, Southern District of Mississippi
U.S. District Court, District of North Dakota
U.S. District Court, Eastern District of Texas
U.S. District Court, Southern District of Texas
U.S. District Court, Western District of Texas

Patent and Intellectual Property Issues

Before: Superior Court, State of Washington
U.S. District Court, Northern District of California
U.S. District Court, District of Colorado
U.S. District Court, District of Connecticut
U.S. District Court, Southern District of Texas

The Economics of Regulated Industries

Before: Alaska Public Utilities Commission
California Energy Commission
California Public Utilities Commission
Federal Energy Regulatory Commission
Nevada Public Service Commission
Wisconsin Public Service Commission
U.S. District Court, Northern District of Oklahoma
U.S. District Court, Northern District of Texas

INVITED PRESENTATIONS REGARDING:

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Lessons From Gas Deregulation, *International Association for Energy Economics, Houston Chapter,* December 2002.

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Non-Price Predation--Some New Thinking About Exclusionary Behavior, *Houston Bar Association*, Antitrust and Trade Regulation Section, October 2000.

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"What Can We Expect From Restructuring In Natural Gas Distribution?" *Energy Law Journal*, January 2000.

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In re: Koch Gateway Pipeline Company; Docket No. RP 97-373-000, Federal Energy Regulatory Commission, May/October 1997 and February 1998.

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Econ One Research, Inc.
Los Angeles, California

DR. JEFFREY J. LEITZINGER
Prior Testimony
December 2000– November 2004

	Proceeding	Court/Commission/Agency	Docket or File	Deposition/ Trial/Hearing	Date	On Behalf Of
1.	In Re: High Fructose Corn Syrup Antitrust Litigation	U.S. District Court, Central District of Illinois	MDL No. 1087	Deposition	February 1998 March 2001	Plaintiff
2.	Louie Alakayak, et al., v. All Alaskan Seafoods, Inc., et al.	Superior Court for the State of Alaska, Third Judicial District	3AN-9S-4676 Civil	Deposition Trial	November 1998 March 2003 May 2003	Plaintiff
3.	Earl A. Anzai, Attorney General for the State of Hawaii v. Chevron Corporation, et al.	U.S. District Court for the District of Hawaii	CV 98 00792	Deposition	September 2000 October 2000 December 2000 February 2001 March 2001 April 2001	Plaintiff
4.	American Central Eastern Gas Company, Limited Partnership, et al. vs. Union Pacific Resources Group, Inc., et al.	U.S. District Court for the Eastern District of Texas, Marshall Division	No. 2-98-CV-0239-DF	Deposition Trial	October 2000 August 2001	Plaintiff
5.	Teco Pipeline Company, individually and on behalf of TransTexas Pipeline Partnership vs. Valero Energy Corporation, et al.	American Arbitration Association, Houston, Texas	No. 70 1980011896	*Deposition*	November 2000 January 2001	Defendant

	Proceeding	Court/Commission/Agency	Docket or File	Deposition/ Trial	Date	On Behalf Of
6.	Exxon Corporation, vs. Department of Conservation and Natural Resources, and Riley Boykin Smith, et al.	U.S. District Court, Montgomery County, Alabama, 15th Judicial District	No. CV-99-2368	Deposition Trial	November 2000 December 2000	Defendant, Counter-Plaintiff
7.	In Re: Methionine Antitrust Litigation	U.S. District Court, Northern District of California	MDL No. 1311	Deposition Hearing	November 2000 December 2000	Defendant
8.	American Garment Finishers Corporation v. Levi Strauss & Company	U.S. District Court for the Western District of Texas, El Paso Division	No. EP-99-CV-342-F	Deposition Trial	December 2000 January 2001	Plaintiff
9.	Edgardo Victa, et al. vs. Kaiser Foundation Health Plan, Inc., et al.	Superior Court of the State of California, County of San Francisco	No. 301998	Deposition	April 2001	Defendant
10.	State of Alabama, and the State of Alabama, Department of Conservation and Natural Resources v. Hunt Petroleum Corporation, formerly known as Louisiana-Hunt Petroleum Corporation	Circuit Court of Mobile County, Alabama	CV-99-002526 RGK	Deposition Trial	July 2001 December 2001	Plaintiff
11.	Southern Union Company v. Southwest Gas Corporation, Oneok, Inc., et al.	U.S. District Court, District of Arizona	No. CIV-99-1294-PHX-ROS	Deposition	August 2001	Defendant
12.	Synagro Technologies, Inc. v. Azurix Corporation	District Court of Harris County, Texas, 270th Judicial District	No. 99-54917	Deposition	August 2001	Defendant

	Proceeding	Court/Commission/Agency	Docket or File	Deposition/ Trial	Date	On Behalf Of
13.	Lane McNamara, et al. v. Bre-X Minerals LTD., et al.	U.S. District Court for the Eastern District of Texas, Texarkana Division	No. 597CV159	Deposition	September 2001	Plaintiff
14.	Ronald Cleveland d/b/a Lone Star Videotronics, Ruben Loredo d/b/a Five Palms Video, et al. vs. Viacom, Inc., Blockbuster, Inc., Paramount Home Video,, Inc. Buena Vista Home Entertainment, Inc., et al.	U.S. District Court for the Western District of Texas, San Antonio Division	Civil Action SA-99-CA-783-EP	Deposition Trial	October 2001 May 2002 June 2002	Plaintiff
15.	KN TransColorado, Inc., v. Questar Corporation, Questar Pipeline Company, Questar TransColorado, Inc., and TransColorado Gas Transmission Company	District Court, Garfield County, State of Colorado	No. 00CV129	Deposition Trial	November 2001 December 2001 April 2002 May 2002	Plaintiff
16.	In the Matter of the Application of Southern California Gas Company Regarding Year Six (1999-2000) Under Its Experimental Gas Cost Incentive Mechanism and Related Gas Supply Matters	Public Utilities Commission of the State of California	A.00-06-023	Hearing	November 2001	Applicant
17.	In Re: Flat Glass Antitrust Litigation	U.S. District Court, Western District of Pennsylvania	MDL No. 1200	Deposition	January 2002	Plaintiff

	Proceeding	Court/Commission/Agency	Docket or File	Deposition/ Trial	Date	On Behalf Of
18.	In Re: Terazosin Hydrochloride Antitrust Litigation	U.S. District Court, Southern District of Florida	Case Nos. 98-3125 and 99-7134	Deposition	January 2002 July 2002 February 2004	Plaintiff
19.	In Re: Chiron Corporation, v. Genentech, Inc.	U.S. District Court, Eastern District of California	No. CIN. S-00-1252 WBS GGH	Deposition	May 2002	Plaintiff
20.	Frederick L. Sample, et al., v. Monsanto Company, et al.	U.S. District Court, Eastern District of Missouri	Case No. 4:01cv65RWS	Deposition Hearing	July 2002 January 2003 April 2003	Plaintiff
21.	Toronto Dominion (Texas), Inc., et al., v. PricewaterhouseCoopers LLP	State Court of Fulton County, State of Georgia	No. 00VS012679-F	Deposition	July 2002	Plaintiff
22.	Elliott Industries Limited Partnership, v. Conoco Inc., Amoco Production Company, and Amoco Energy Trading Corporation	U.S. District Court, District of New Mexico	Cause No. CIV-00-655-JC-WWD-ACE	Deposition	July 2002	Plaintiff
23.	Duramed Pharmaceuticals, Inc. v. Wyeth-Ayerst Laboratories, Inc.	U.S. District Court, Southern District of Ohio	No. C-1-00-735	Deposition	August 2002	Plaintiff
24.	Computer Access Technology Corporation, v. Catalyst Enterprises, Inc.	U.S. District Court, Northern District of California, Oakland Division	No. C 00-4852 DLJ	Deposition Trial	September 2002 November 2002	Plaintiff

	Proceeding	Court/Commission/Agency	Docket or File	Deposition/ Trial	Date	On Behalf Of
25.	ISPTel, Inc. v. Lucent Technologies, Inc.	U.S. District Court, Northern District of California, Oakland Division	No. C 01-1390 CW (ARB)	Deposition	November 2002	Plaintiff
26.	Synopsys, Inc. v. Nassda Corporation	U.S. District Court, Northern District of California, San Francisco Division	No. C-01-2519-SI	Deposition	November 2002	Plaintiff
27.	The Goeken Group Corporation and In-Flight Phone Corporation v. McCaw Cellular Communications, Inc., Claircom Communications, L.P., and Hughes Network Systems, Inc.	The Circuit Court of DuPage County, Illinois, Eighteenth Judicial District	No. 93 CH 1065	Deposition	June 2003	Plaintiff
28.	In Re: Ciprofloxacin Hydrochloride Antitrust Litigation	U.S. District Court, Eastern District of New York	No. 1:00-MD-1383	Deposition	July 2003 May 2004	Plaintiff
29.	In Re: Scrap Metal Antitrust Litigation	U.S. District Court, Northern District of Ohio, Eastern Division	No. 1:02 CV 0844	Deposition	August 2003 September 2004	Plaintiff
30.	KLA-Tencor Corporation v. Tokyo Seimitsu Co. Ltd., and TSK America, Inc.	U.S. District Court, Northern District of California, Oakland Division	No. CV01-2489 SBA	Deposition	August 2003	Plaintiff (Counterclaim)
31.	In Re: Relafen Antitrust Litigation	U.S. District Court, District of Massachusetts	No. 01-CV-12239 (WGY)	Deposition	September 2003 December 2003	Plaintiff

	Proceeding	Court/Commission/Agency	Docket or File	Deposition/ Trial	Date	On Behalf Of
32.	Francis Ferko, and Russell Vaughn, as Shareholders of Speedway Motorsports, Inc. v. National Association of Stock Car Auto Racing, Inc.; International Speedway Corporation; and Speedway Motorsports, Inc.	U.S. District Court, Eastern District of Texas, Sherman Division	No. 4:02-CV-50	Deposition	November 2003	Plaintiff
33.	Chevron U.S.A., Inc. v. State of Louisiana, Louisiana State Mineral Board, and Louisiana Department of Natural Resources	U.S. District Court, 17th Judicial District, Parish of Lafourche, Louisiana	Number 93,658 Division C	Deposition Trial	January 2004 March 2004	Defendant
34.	Houston McLane Company, Inc. and Houston Regional Sports Network, L.P., v. Affiliated Regional Communications, Ltd., d/b/a/ Fox Sports Southwest	U.S. District Court, 333rd Judicial District, Harris County, Texas	Cause No. 2003-10943	Deposition	March 2004	Plaintiff
35.	Harry E. Stetser, Dale E. Nelson and Michael deMontbrun v. TAP Pharmaceutical Products, Inc., et al	State of North Carolina, New Hanover County, In The General Court of Justice, Superior Court Division	File No. 01CVS 5268	Deposition	April 2004	Plaintiff
36.	Masimo Corporation, vs. Tyco Health Care Group L.P., and Mallinckrodt, Incorporated	U.S. District Court, Central District of California, Western Division	Case No. CV-02-4770	Deposition	April 2004	Plaintiff

	Proceeding	Court/Commission/Agency	Docket or File	Deposition/ Trial	Date	On Behalf Of
37.	J.B.D.L. Corp. d/b/a Beckett Apothecary, et al. v. Wyeth-Ayerst Laboratories, Inc., et al.	United States District Court, Southern District of Ohio, Western Division	Civil Action No. C-1-01-704	Deposition	May 2004 November 2004	Plaintiff
38.	Dewana G. Turner, Bonita H. Hixson, and Yolanda P. Monroe, on behalf of themselves and all others similarly situated v. Alaska Communications Systems Long Distance, Inc., and Alaska Communications Systems Group, Inc.	Superior Court for the State of Alaska, Third Judicial District at Anchorage	Case No. 3AN-01-7208 CI	Deposition	July 2004	Defendants
39.	In Re: Remeron Direct Purchaser Antitrust Litigation	U.S. District Court, District of New Jersey	Master Docket No. 03-CV-0085	Deposition	July 2004	Plaintiff

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

IN RE: MICROSOFT CORP. ANTITRUST LITIGATION	MDL DOCKET NO. 1332 Hon. J. Frederick Motz
This Document Relates To: *Kloth v. Microsoft Corp.*, No. JFM-00-2117	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR FINAL APPROVAL OF PROPOSED SETTLEMENT

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs Franklin DeJulius, Paul Deiter and Gary Leach submit this memorandum in support of their motion for final approval of the Settlement Agreement (the "Settlement") in this class action. The Settlement is an excellent result in this litigation, providing Class Members with an amount equal to 55.1% of the total purchase price paid for each qualified license during the class period, while incorporating substantive protections for the rights of certain non-class members.

The Settlement is fair, reasonable, and adequate based on the factors that the United States Court of Appeals for the Fourth Circuit has indicated courts should employ to evaluate settlement agreements. Accordingly, final approval should be granted, following the hearing scheduled for April 16, 2004.

FACTUAL BACKGROUND

This is a class action brought against Microsoft Corporation ("Microsoft") by licensees of its software. The Plaintiffs in this action include direct purchasers of Microsoft Operating

System Software Licenses, as well as those whom the Court previously determined were indirect purchasers. The Settlement, if approved, will resolve the claims of certain direct purchasers who purchased Microsoft Operating System Software Licenses in transactions through a web site maintained by Microsoft and through certain direct marketing campaigns which Microsoft conducted.

On May 27, 2003, this Court entered an Order granting in part and denying in part the plaintiffs' motion for class certification. In that Order, the Court certified a class pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure solely for the pursuit of monetary damages. (Order of May 27, 2003). The Court defined the certified class as follows:

> All persons and entities in the United States who acquired directly from Microsoft through the shop.microsoft.com Web site (by ordering on line or by calling the toll free number provided there) a license, other than for re-sale or re-licensing, for Microsoft single-user operating system software, including upgrades, compatible with *x*86 computers, but not including Windows 2000 or Windows NT, from February 22, 1999 through April 30, 2003.

(*Id.*). The Court appointed Franklin DeJulius, Paul Deiter and Gary Leach as the Class Representatives. On July 28, 2003, upon Plaintiffs' motion for partial reconsideration, the Court expanded the class to "include persons who purchased Microsoft Operating Systems Software as 'Full Package Product' in direct marketing campaigns during the class period." (Order of July 28, 2003). The parties conferred on an appropriate definition to implement this modification of the certified class, and agreed that the following definition is appropriate:

> (1) all persons and entities in the United States who acquired directly from Microsoft through the shop.microsoft.com Web site (by ordering on line or by calling the toll free number provided there by Microsoft) a license, other than for resale or re-licensing, for Microsoft single-user operating system software, including upgrades, compatible with *x*86 computers, but not including Windows 2000 or Windows NT, from February 22, 1999 through April 30, 2003; and (2) all persons and entities in the United States who acquired directly from Microsoft through direct marketing campaigns (by placing an order in response to such a campaign and paying an amount in excess of shipping and handling charges), a

license, other than for resale or re-licensing, for Microsoft single-user operating system software in Full Packaged Product form, including upgrades, compatible with $x86$ computers, but not including Windows 2000, Windows NT, or any beta, preview or other trial version of Microsoft single-user operating system software, from November 10, 1995 through April 30, 2003 (the "Class").

This case was listed for trial to commence on September 8, 2003. Following many months of discussion and arm's length negotiation, on September 16, 2003, the parties executed a proposed settlement agreement, which resolved the claims of the Class. The proposed Settlement provides for Microsoft to make a cash payment to each Class member equal to 55.1% of the total purchase price paid for each license (other than for re-sale or re-licensing) of Microsoft single-user operating system software, including upgrades, compatible with $x86$ computers, but not including Windows 2000 or Windows NT, acquired from Microsoft through the shop.microsoft.com Web site (by ordering on line or by calling the toll free number provided there), or pursuant to a Microsoft direct marketing campaign from November 10, 1995 through April 30, 2003. (Settlement Agreement at 15).

Based on Microsoft's records, the aggregate amount that would be paid to class members is estimated at $10,500,000, exclusive of the cost of notice, administration, attorneys' fees and expenses. (Settlement Agreement at 15). Class members will be paid automatically based upon Microsoft's records of their purchases, but they will be furnished the opportunity to demonstrate that they are entitled to a greater amount if they have the requisite proof that they acquired additional licenses or paid more for their licenses than Microsoft's records reflect. (Settlement Agreement at 16-17). In return, Microsoft will receive a release of the Class members' claims. The release, by its terms, will not apply to claims related to any conduct of Microsoft after April 30, 2003 or to claims arising from what the Court has previously held to be indirect purchases. (Settlement Agreement at 13-14).

The Class Representatives wish to appeal the Court's refusal to include other groups of licensees in the Class in this action. This added complexity to the settlement agreement, because measures had to be designed in an effort to preserve that right of appeal notwithstanding the terms of the settlement and the release. Consequently, the release explicitly indicates that it is "not intended to impair or affect the Class Representatives' interest in shifting the cost of litigation, including attorneys' fees and expenses, to other licensees of Microsoft Operating Systems Software in the event that a broader class of licensees of Microsoft Operating System Software is subsequently certified following an appeal by the Class Representatives and the members of that broader class recover whether by settlement or by judgment." (Settlement Agreement at 14). Further, the Settlement Agreement includes a provision restricting the scope of what Microsoft may argue on appeal. (Settlement Agreement at 12).

The proposed Settlement provides for notice in three ways. First, all Class members are to receive notice by mail, except that where Microsoft's records include an email address but no physical address, the notice will be disseminated by email. (Settlement Agreement at 8). Second, an internet Website has been established, and a copy of the notice has been placed there as well. Third, there will be notice by publication in *USA Today*. (Settlement Agreement at 7). On October 8, 2003, the Court granted preliminary approval of the settlement as set forth in the Settlement Agreement and approved the form and manner of notice. By order dated December 30, 2003, this Court modified the form of notice and rescheduled the final approval hearing for April 16, 2004.

Notice was sent out to all Class members commencing on January 23, 2004, and the published notice is scheduled to appear on or before February 9, 2004.[1] Under this Court's

[1] Affidavits will be submitted in advance of the final approval hearing documenting the mailing and publication of notice.

Order of December 30, 2003, the deadline for exclusion requests and objections is March 26, 2004.

ARGUMENT

A. THE SETTLEMENT SHOULD BE APPROVED BECAUSE IT IS FAIR, REASONABLE, AND ADEQUATE.

Rule 23(e) of the Federal Rules of Civil Procedure requires that the settlement of a class action be approved by the Court following notice to all members of the class. *See* Fed. R. Civ. P. 23(e). Approval of a class action settlement is a matter of discretion for the trial court, but there is a strong presumption that the compromise is fair and reasonable. *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 663 (E.D. Va. 2001). In exercising its discretion, the Court will normally "limit its proceedings to whatever is necessary to aid it in reaching an informed, just, and reasoned decision." *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th. Cir. 1975). Approval by the Court serves to protect class members "whose rights may not have been given adequate consideration during the settlement negotiations." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991). However, the ultimate purpose of Court approval is to ensure that the settlement is fair, reasonable, and adequate. *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 827 (E.D.N.C. 1994).

In the Fourth Circuit, the approval of a proposed settlement is guided by a "bifurcated analysis," in which the factors relating to the fairness of a settlement are separated from the factors relating to its adequacy. *In re Jiffy Lube Sec. Litig.*, 927 F.2d at 159; *see also Horton*, 855 F. Supp. at 828. Under *Jiffy Lube*, the Court should first consider factors relevant to determining the fairness of a settlement; if the settlement is found to meet the fairness factors, the Court should then assess the adequacy of the settlement. *Id.*; *see also Strang v. JHM Mortgage Sec. Limited Partnership*, 890 F. Supp. 499, 501 (E.D. Va. 1995). As discussed in

detail below, an analysis of the relevant factors indicates that this Settlement should be approved. Both the compensation provided to the Class members and the provisions incorporated to preserve the appellate rights of others indicate that the Settlement is a very good one.

1. The Settlement Satisfies the Fairness Factors.

In order to ensure a fair settlement, the Court should make certain that the settlement was reached as a result of good faith, arm's length bargaining. *In re Montgomery County Real Estate Antitrust Litig.,* 83 F.R.D. 305, 315 (D. Md. 1979). In evaluating the "fairness" of a settlement, the Court should consider factors which signify the absence of collusion among the parties. *Id.* In *Jiffy Lube*, the Fourth Circuit enumerated four factors to be considered by a trial court in determining the fairness of a settlement: "(1) the posture of the case at the time settlement is proposed; (2) the extent of discovery that has been conducted; (3) the circumstances surrounding the negotiations; and (4) the experience of counsel . . . ." *In re Jiffy Lube Sec. Litig.*, 927 F.2d at 159; *see also In re Montgomery County Real Estate Antitrust Litig.,* 83 F.R.D. at 315. These factors, when applied to the circumstances of this case, demonstrate that the Settlement is fair. *See In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d at 663-664.

a. Posture of the case at the time of the settlement.

Where a settlement is reached at a very early stage in the litigation, questions of possible collusion among the settling parties are raised. *Jiffy Lube,* 927 F.2d at 159. However, where settlement is reached at a later stage of litigation, this factor points strongly in favor of the settlement. *Vaughns v. Board of Educ.*, 18 F. Supp. 2d 569, 579 (D. Md. 1998). This litigation commenced in late 1999. At the time the Settlement was reached, the case had been pending for several years. The Class had been certified, fact and expert discovery were completed, and plaintiffs at least had done most of their trial preparation. Because the settlement negotiations

took place up to and after the date set for trial at a later stage in the litigation, this factor points strongly towards a finding of fairness.

b. Extent of discovery.

An evaluation of the extent of discovery that had already been conducted at the time of settlement serves to assure "sufficient development of the facts to permit a reasonable judgment on the possible merits of the case." *Flinn*, 528 F.2d at 1173. This fairness factor can be satisfied where a plaintiff has conducted informal discovery and investigation to evaluate the merits of defendants' positions during settlement negotiations. *See Strang*, 890 F. Supp. at 501.

In this case, the parties had engaged in extensive discovery prior to the settlement discussions. The parties took 120 depositions, and plaintiffs reviewed approximately 3.4 million pages of documents. Plaintiffs plainly had conducted sufficient discovery and investigation prior to negotiating the Settlement to evaluate the merits of Defendant's positions during settlement negotiations.

c. Circumstances surrounding the negotiations.

The circumstances that surround the negotiation of a settlement are an important factor in determining its fairness because they tend to provide evidence from which a trial judge can assess whether there has been bad faith or collusion among the parties. Where both parties to litigation "diligently pursued their respective positions since the inception of the case," there is no indication of bad faith or collusion, and this factor weighs in favor of a finding of fairness. *Henley v. FMC Corp.*, 207 F. Supp. 2d 489, 493 (S.D.W.Va. 2002). As this Court has seen, this litigation has been adversarial and hard-fought, with plaintiffs' counsel spending millions of dollars in time and money to litigate this case. The settlement negotiations were equally adversarial, and the settlement is the product of arm's length, hard-fought, negotiations. There is

nothing in the record which would indicate the settlement negotiations were conducted in bad faith or through collusion.

d. Experience of class counsel.

The background, experience and accomplishments of the attorneys who represented the Class in this action demonstrate that they are extremely knowledgeable in the area of class action and antitrust litigation. Michael D. Hausfeld and Stanley M. Chesley were appointed as co-chairs of the committee of lead counsel, which was comprised of seven other lawyers with significant antitrust experience. The Court also appointed an executive committee of seasoned litigators. There is no question that Plaintiffs' counsel have the requisite skill and experience in the area of antitrust class actions. Because Plaintiffs' counsel have competently and capably represented the Class members throughout the negotiation process, this factor weighs heavily in favor of a finding of fairness.

2. The Settlement Satisfies the Adequacy Factors.

To approve a settlement agreement, the Court must conclude that it is adequate. *Strang*, 890 F. Supp. at 502. In evaluating the adequacy of a proposed settlement, the Court should weigh the likelihood of the plaintiffs' recovery on the merits against the amount offered in settlement. *In re Montgomery County Real Estate Antitrust Litig.*, 83 F.R.D. at 315-16. The factors to be considered in assessing the adequacy of a settlement are:

> (1) the relative strength of the plaintiffs' case on the merits; (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial; (3) the anticipated duration and expense of additional litigation; (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment; and (5) the degree of opposition to the settlement.

Jiffy Lube, 927 F.2d at 159; *In re Montgomery County Real Estate Antitrust Litig.*, 83 F.R.D. at 316. These factors, when applied to the circumstances of the Settlement, demonstrate that the Settlement is adequate and should be approved.

a. Strength of the plaintiffs' case on the merits and existence of difficulties of proof or strong defenses.

A review of the parties' positions on the merits favors the approval of the Settlement. While plaintiffs believe, based on their investigation, discovery and the work of their experts, that their claims against Microsoft have considerable merit and that they would prevail in a trial, neither party can be certain of the outcome. *See In re Nasdaq Market-Markers Antitrust Litig.*, 187 F.R.D. 465, 467 (S.D.N.Y. 1998) ("Antitrust litigation in general, and class action litigation in particular, is unpredictable."). The facts to be presented at trial would, in plaintiffs' view, establish that Microsoft violated Section 2 of the Sherman Act, but convincing a jury of the level of damages could nonetheless prove difficult. Moreover, success at trial would not end matters, as an appeal would likely follow, placing the value of any judgment at risk. *See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 268 (2d Cir. 1979)(vacating $87 million judgment and remanding for new trial).

The Settlement provides every Class member with an amount equal to the overcharge calculated by the plaintiffs' damage expert.[2] In essence, the Class gives up the prospect of treble damages after trial for the certainty of receiving in cash the amount they were overcharged. This recovery, when weighed against the relative strength of plaintiffs' case on the merits, indicates that the proposed Settlement is adequate.

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[2] A copy of the Report of Dr. Leitzinger, plaintiffs' damage expert, was filed of record on September 17, 2002 as Supplemental Authority in support of Plaintiffs' Class Certification motion.

b. Anticipated duration and expense of additional litigation.

The third factor, the cost and duration of additional litigation, weighs heavily in favor of a finding of adequacy. Where a trial would be protracted and complex and would result in a substantial financial burden for all parties involved, this factor supports a finding of adequacy. *See Horton*, 855 F. Supp. at 833; *In re Montgomery County Real Estate Antitrust Litig.*, 83 F.R.D. at 317. At the time of settlement, the parties were prepared to go to trial, but further litigation was still likely in the form of appeals, which would result in further expense and delay. *Vaughns v. Board of Educ.*, 18 F. Supp. 2d at 579-80.

c. Solvency of the defendants and the likelihood of recovery on a litigated judgment.

There is no doubt that Microsoft would be able to satisfy any judgment entered against it. Given the other factors relating to the adequacy of the settlement, this is not a significant consideration. *Henley*, 207 F. Supp. 2d at 494.

d. Degree of opposition to the settlement.

The final factor touching on fairness is the reaction of the Class. *See In re Montgomery County Real Estate Antitrust Litig.,* 83 F.R.D. at 317 ("in determining the acceptability of a proposed class action settlement, the court may consider the strength of the opposition from class members."). At this juncture, it is premature to assess the reaction of the Class to the Settlement, as notice was only recently mailed, and the deadline for objections and exclusion requests is March 26, 2004. At the appropriate time, plaintiffs will report to the Court on the number of opt outs and the number and nature of any objections to the settlement. In that report, plaintiffs will comment on the degree of opposition to the settlement. Given that this Settlement recovers 100% of the Class's overcharge, plaintiffs do not expect much opposition to the settlement.

Plaintiffs certainly do not expect the degree of opposition that would warrant the rejection of a settlement so favorable to the Class.

CONCLUSION

The Settlement is fair, reasonable, and adequate, and final approval should be granted following the hearing on April 16, 2004.

Dated: February 5, 2004

Respectfully submitted,

/s/ Michael D. Hausfeld
Michael D. Hausfeld
Cohen, Milstein, Hausfeld & Toll, PLLC
1100 New York Avenue, NW
Suite 500 West Tower
Washington, D.C. 20005
202-408-4600

Stanley M. Chesley
Waite, Schneider, Bayless & Chesley Co., L.P.A
1513 Fourth & Vine Tower
One West Fourth Street
Cincinnati, OH 45202
513-621-0267

PLAINTIFFS' CO-CHAIRS

CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of Plaintiff's Motion and Memorandum in Support of Final Approval of Proposed Settlement were served on all counsel of record via the Court's Electronic Filing System and by facsimile upon David Tulchin, Esq., counsel for Microsoft Corporation

Dated: February 5, 2004

/s/ Robert J. Wozniak, Jr.
Robert J. Wozniak, Jr.